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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 100,
CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. ALLEN ZOLLARS.*†

HON. JOSEPH A. S. MITCHELL.‡

HON. WILLIAM E. NIBLACK.†

HON. GEORGE V. HOWK.†

HON. BYRON K. ELLIOTT.§

*Chief Justice at the November Term, 1884.

†Term of office commenced January 1st, 1883.

‡Term of office commenced January 6th, 1885.

§Term of office commenced January 3d, 1881.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK. †

HON. WALPOLE G. COLERICK.§

*Chief Commissioner.

†Appointed April 27th, 1881.

‡Appointed May 29th, 1882.

§Appointed November 9th, 1883.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.



C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1884, IN THE SIXTY-
NINTH YEAR OF THE STATE.

No. 11,615.

CHISSOM ET AL. v. BARBOUR ET AL.

SPECIAL JUDGE.—*Appointment of.*—Where the order appointing an attorney as special judge, upon an application for change of judge, recites that it is deemed difficult to procure a judge of another court without unreasonable delay, there is no room to question the appointment on the ground that no effort was made to procure another judge.

PRACTICE.—*Change of Venue.*—*Delay.*—Where a motion for a change of venue from the county is supported by a proper affidavit, but the counsel presenting the motion states in open court that the purpose of the motion is delay, the motion should be struck from the files.

JUDGMENT.—*Nunc pro Tunc Entry.*—*Evidence.*—The power of a court to make *nunc pro tunc* entries in proper cases is inherent, and is not governed by section 396, R. S. 1881, and may be made upon memoranda by the clerk in his issue docket, and upon a special finding of facts by the court in the cause, with his conclusions of law thereon.

SAME.—*Time.*—Such *nunc pro tunc* entry of a judgment should be made as of the date when the judgment was actually pronounced.

SAME.—*Bill of Exceptions.*—*Motion.*—*Semble,* that a motion for a *nunc pro tunc* entry is no part of the record unless made so by bill of exceptions or order of court.

From the Marion Circuit Court.

100	1
132	101
100	1
138	631
100	1
147	138
100	1
153	90
100	1
156	235

Chissom *et al.* v. Barbour *et al.*

I. Klingensmith, for appellants.

R. B. Duncan, J. S. Duncan, C. W. Smith and J. R. Wilson,
for appellees.

ZOLLARS, C. J.—It is recited in the record before us that on the 9th day of March, 1883, appellees filed a motion in the above entitled cause to have a judgment in their favor entered *nunc pro tunc*.

It is contended by appellees that the motion is not in the record, because not brought into it by a bill of exceptions, and in support of that contention they cite us to the case of *Ellis v. Keller*, 82 Ind. 524. The case before us seems to fall within the ruling in that case, but we have concluded to examine it upon its merits. It is stated in appellees' motion for a *nunc pro tunc* entry, that on the 1st day of July, 1867, judgment was rendered in their favor for costs against appellants, who were, and are, the plaintiffs in the action, and that the clerk neglected and failed to make a formal entry of that judgment. After various rulings, the court below heard the evidence and ordered and adjudged that the *nunc pro tunc* entry should be made, as asked by appellees. From this ruling appellants have appealed. The action by appellants seems to have been to have a deed declared to be a mortgage, and to thus recover the real estate therein described.

The several reasons urged in this court for a reversal of the judgment ordering the *nunc pro tunc* entry, we notice in the order in which they are presented in argument. Upon the application of appellants, the venue was changed from the judge. Upon the granting of the change, Hon. James E. Heller, a practicing attorney of the Marion county bar, was appointed as a special judge to hear and determine the case presented by the motion for a *nunc pro tunc* entry. It is claimed in argument that the appointment was unlawful, because no effort was made to procure a judge of some court to sit in the case before appointing an attorney. Section 415, R. S. 1881, provides that when a change of venue is granted

from the judge, as was done here, the court or judge shall call a judge of any court of general jurisdiction, etc., to preside in and try the case, "or, if it shall be difficult, in the opinion of the court, for any cause, to procure the attendance of such judge, the court, in order to prevent delay, may appoint any competent and disinterested attorney of this State," etc. The case before us is brought clearly within this statute. It is recited in the record as made by the clerk, and in a bill of exceptions, that in the opinion of the court it was difficult to procure the attendance of any other judge without unreasonable delay, and that Mr. Heller was appointed to prevent such delay, etc.

The court overruled a motion for a change of venue from the county and from the judicial circuit. This motion was supported by an affidavit, in which it is stated that on account of the influence of appellees over the citizens of Marion county, and local odium and prejudice, etc., appellants could not have a fair trial in the county. This motion was properly overruled, for several reasons. We need mention but two. In the first place, there was a rule of court that applications for a change of venue should be made not later than the day before the day set for the hearing or trial. Works Pr., sec. 1273, and cases there cited. In the second place, the record shows that at the time the motion and affidavit for the change were filed and presented to the court, counsel for appellants stated that they were filed and presented for the purpose of procuring time.

It seems that the hearing had been postponed at a previous term on the agreement, on the part of appellants, that they would submit the matter at, or within a few days after, the opening of the term at which this application for a change of venue was made. Upon the opening of the term, applications for postponement were renewed and overruled. The application for a change of judge was also accompanied with the statement that it was made for the purpose of procuring further time. Such a statement amounts, really, to a confes-

Chissom *et al.* v. Barbour *et al.*

sion of perjury by the party making the application. Upon such a statement being made, the applications should have been struck from the files. The court was not only justified in overruling the motion, but would have been justified in a resort to measures much more severe. The courts will neither encourage, countenance nor tolerate a practice that involves such moral turpitude.

It is contended further, on the part of appellants, that the power to order the *nunc pro tunc* entry is derived solely from section 396, R. S. 1881, and that under that section the application should have been made within two years after the judgment was pronounced. That this is not so, has been several times decided by this court. In the case of *Burson v. Blair*, 12 Ind. 371, it was said that all courts possess inherent power to correct clerical mistakes in their proceedings. In the case of *Miller v. Royce*, 60 Ind. 189, the application was for a *nunc pro tunc* entry of the amount of the judgment, that having been left in blank by the clerk making the entry of the judgment. The application was made more than twelve years after the rendition of the judgment. In the opinion by this court, it was said: "It is well settled, by numerous decisions of this court, that the courts of this State are possessed of full and ample powers to correct mistakes and supply omissions in their records, whenever and wherever the records supply the means for making such corrections or supplying such omissions. The powers of the courts in the premises are derived chiefly from acts of Parliament, which, with the common law of England, are parts of the laws of this State, and especially from 8 Henry VI., c. 12."

The case of *Makepeace v. Lukens*, 27 Ind. 435, was an application for a *nunc pro tunc* entry of an order made by the court, but not entered by the clerk. After a learned review of the English statutes, including 8 Henry VI., c. 12, it was said that under the authority of these statutes alone, amendments can be made of the record, where the proceedings are

no longer *in fieri*, and the term is passed in which the record was made.

The case of *Smith v. State*, 71 Ind. 250, was also an application for a *nunc pro tunc* entry. There it was said again that the courts of the State are possessed of full and ample powers to correct mistakes and supply omissions in their records, whenever and wherever the record affords the means for making such corrections and supplying such omissions, and that these powers are derived chiefly from 8 Henry VI., c. 12. See, also, *Sidener v. Coons*, 83 Ind. 183, where the case of *Miller v. Royce*, *supra*, is cited and quoted from with approbation. See, also, as bearing upon the question, *Ellis v. Keller*, *supra*, and *Newhouse v. Martin*, 68 Ind. 224.

The case of *Reily v. Burton*, 71 Ind. 118, restates the proposition, that the power of the courts to order *nunc pro tunc* entries of their judgments is derived chiefly from 8 Henry VI., c. 12, and holds valid such an entry made three years after the rendition of the judgment. Section 396, R. S. 1881, relied upon by appellants, provides that the courts shall relieve a party from a judgment taken against him through his excusable neglect, etc., "and supply an omission in any proceedings on complaint or motion filed within two years." The "omission in the proceedings," we think, relates to the proceedings in the action, and not to the simple neglect of the clerk to enter up the proceedings. The proceedings is the thing itself—what is actually done; the entry of the clerk is simply evidence of what has been done. The proceedings and the entry of them are different, as the rendition of judgment and the entry of judgment are different and distinct each from the other. As said in the case of *Reily v. Burton*, *supra*, the rendition of the judgment is the act of the court, while the entry of the judgment is the act of the clerk of the court. See, also, *Anderson v. Mitchell*, 58 Ind. 592. If we are correct in this construction of the statute, and if the former cases above cited are correct, it follows that the limitation of two years does not apply to a case like this, where it

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is asked simply that the entry of the proceedings, the judgment in this case, shall be made as of the date when the proceedings were had.

It is contended still further by appellants, that there was nothing, or at least no evidence of anything, upon which to base an order and judgment for a *nunc pro tunc* entry of a judgment. Upon the hearing below, appellees introduced in evidence entries made by the clerk in a docket, called the clerk's issue docket. These entries were made in the case, following the proper entitling of the case, and show the defendants (appellees) ruled to answer, and the other various steps in the case, including the submission of the cause to the court, finding for defendants, new trial overruled, sixty days to plaintiffs (appellants) to file a bill of exceptions, and finally, "judgment vs. plaintiffs for costs. Order-book 24, page 582." Following each one of the entries in the issue docket is a like reference to different pages of this same order-book. Whether any of these entries were in the order-book at length, we can not tell certainly from the record. No order-book containing these several entries was introduced in evidence, and there is nothing in the record or the briefs of counsel to explain these references to the order-book.

Appellees also introduced in evidence, from the order-book referred to in the issue docket, and at the page last indicated, a special finding of facts made by Judge Hines who tried the case, and his conclusions of law upon those facts in favor of appellees. This entry from the order-book shows that appellants excepted to the conclusions of law, moved for a new trial, and, upon that being overruled, were granted time in which to file a bill of exceptions. There is no judgment for costs in this entry from the order-book. That seems to be found alone in the clerk's issue docket. It is not found in the court's docket, and, because not found there, appellants contend that it can not be made a basis upon which to predicate a *nunc pro tunc* entry; that there is nothing to show that the clerk made the note of the judgment by order of

the court. In short, that there is nothing to show that a judgment was rendered.

In Daniell's Chancery Pleading and Practice, page 1017, it was said, that orders to enter decrees *nunc pro tunc* will be made after a very long interval has elapsed from the time of pronouncing the decree, and even where the original decree has been lost, the court has permitted it to be entered *nunc pro tunc*, from the official copy, after the lapse of twenty-three years.

In the case of *State, ex rel., v. Mayor, etc.*, 24 Ala. 701, it was held that a *nunc pro tunc* entry may be made on the written opinion of the judge, when he is required to file such an opinion.

In *Yonge v. Broxson*, 23 Ala. 684, it was said: "The motion docket is a book of the court required by law to be kept by the clerk, and the entries in it may be looked to as showing the orders taken by the court, and are sufficient evidence to authorize the rendition of a judgment *nunc pro tunc*." In the case of *Sidener v. Coons, supra*, it was held that the judgment could be corrected by the note sued on. See, also, to same effect, *Conway v. Day*, 79 Ind. 318; *Mitchell v. Lincoln*, 78 Ind. 531. We give these cases simply as examples of what may be a sufficient basis upon which to predicate a *nunc pro tunc* entry.

Without extending this opinion by elaboration, we think that the special finding of facts, and the conclusions of law made thereon by the court, and the note made by the clerk in a docket which the law requires him to keep, R. S. 1881, section 402, without reference to the affidavit of Judge Hines, that he rendered and announced the judgment, are sufficient to authorize the court to order the *nunc pro tunc* entry. See, again, *Makepeace v. Lukens, supra*.

A motion was made below to modify the order, so that the judgment might be rendered and entered as of the date of these proceedings. In answer to this, it is sufficient to say that there was no occasion for rendering a judgment, nor

 Adams et al. v. Sullivan.

would it have been proper, because a judgment had already been rendered, and this proceeding was simply to have that judgment entered as of the proper date. The fact that appellants may not now appeal from that judgment, is not in the way of the *nunc pro tunc* entry. If they wished to appeal, they might have had the judgment entered in time. Some other questions are discussed, but it is not necessary to extend this opinion in an examination of them, as they would not change the result.

Judgment affirmed, with costs.

Filed Jan. 24, 1885.

No. 10,998.

ADAMS ET AL. v. SULLIVAN.

WAREHOUSEMAN.—Evidence.—Unsigned Memoranda.—In an action against a warehouseman to recover for damages to eggs stored in his warehouse, unsigned slips of paper upon which were written by plaintiff's employees the number and quality of eggs in each barrel when stored, and also the relative number of good and bad eggs when they were withdrawn from storage, and which were then reported to plaintiff's book-keeper, and a synopsis of each entered upon his books, do not constitute the best evidence of such facts, and parol evidence thereof is admissible.

SAME.—Measure of Damages.—Instruction.—In such case, an instruction, which, in effect, tells the jury that in making up the amount of damages, in the event of a finding for the plaintiff, the eggs should be estimated at the highest market price which the plaintiff could have obtained for them, at the time they were injured, is erroneous, as they should be estimated according to their market value in the locality where they were injured, and, if the time be indefinite and the market fluctuating, the average range of prices would be the proper standard of their market value.

EVIDENCE.—Witness.—Expert.—Time.—Remoteness.—Discretion of Court.—Where B. is called as a witness by the defendant to impeach the competency of F., a witness for plaintiff, in a particular employment, and it is proposed to prove by B. that three or four years previously F. had been in his service, and that he was neither an expert nor a competent person for such particular employment, the trial court may exclude such testimony as too remote, as in such cases the remoteness or proximity of the time rests very much in the discretion of the *nisi prius* court.

Adams *et al.* v. Sullivan.

SAME.—Proof of Reputation.—Particular Employment.—Proof of reputation is not admissible to show what a party's relations are to a limited number of persons, or what his qualifications may be for some merely private pursuit, or whether he is skilled in some particular employment.

From the Marion Superior Court.

R. N. Lamb and *S. M. Shepard*, for appellants.

C. Byfield and *L. Howland*, for appellee.

NIBLACK, J.—The appellants, David M. Adams and James C. Adams, doing business in the firm name of the Adams Packing Company, were, during the summer and fall of the year 1881, the proprietors of a warehouse in the city of Indianapolis, containing what was known as a "cold storage room," claimed to be, amongst other things, specially adapted to the storage of eggs and butter. The appellee, John E. Sullivan, was, during the same period of time, in the general produce business in the same city, which included the purchase, handling and sale of eggs and butter. Commencing on the 8th day of June and ending on the 5th day of September in said year 1881, Sullivan deposited in the cold storage room in question the aggregate amount of two hundred and twenty-nine barrels of eggs and fifty or more tubs of butter for safe-keeping. When Sullivan withdrew these barrels of eggs and tubs of butter for sale and consumption late in the fall, he claimed to have found them all in a more or less damaged condition, and this action was instituted for the alleged failure of the appellants to take proper care of the eggs and butter while stored in their warehouse. Verdict for the plaintiff at special term, assessing his damages at the sum of \$897.50. New trial denied, and judgment on the verdict. Judgment affirmed at general term.

As regards the eggs, the manner in which they were handled, stored and prepared for market, was first shown by the evidence. It was in this way made to appear that when eggs were gathered in either by wagons or from shipments by railroad, they were put into a dark room, where they were examined and tested by an employee of the plaintiff known to

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those engaged in buying and selling eggs as a "candler." This examination was made by the candler placing each egg between his eyes and a light, by means of which he was enabled to test the quality of each egg, and to classify it accordingly. The eggs were then taken by another employee known as a "packer," and packed in oats into barrels, putting the best quality together and calling them "A" eggs, and those not so good together and calling them "B" eggs, throwing away all the rest as bad eggs. When the eggs were withdrawn from the warehouse, they were *candled* in the same manner as above, before they were thrown upon the market. When the packer filled a barrel, he wrote on a slip of paper something denoting the quality of the eggs and the number of dozen the barrel contained. These slips were reported from time to time to the book-keeper, who entered a synopsis of the information they conveyed upon the plaintiff's books. After the eggs were withdrawn from the warehouse and again examined, the number of good, as well as of bad eggs, found in each barrel respectively, was written on a slip of paper, and in this way the condition of the eggs in each barrel was, at different intervals of time, reported to the book-keeper, who, also, entered a synopsis of what each slip contained upon the books of the plaintiff.

A young woman was book-keeper for the plaintiff during the summer and fall of 1881, and as a witness in his behalf first testified to and explained the manner in which the number and quality of the eggs stored in the warehouse, as well as their condition after they were withdrawn, were reported to her, and to the disposition made of the slips of paper from which she made entries in the books in her charge. She was then asked: "From these reports you may state what number of good and what number of bad eggs were * * * stored in the Adams Packing House?" This question was objected to by the defendants, but the witness was permitted to answer it, giving the aggregate number of the good eggs, as well as of the bad eggs, as they had been reported to her.

It is insisted that the court erred in permitting this question to be answered, upon the ground that the slips of paper constituting the reports made to the witness were the best evidence and ought to have been produced. But these slips of paper were only unsigned memorandums, which of themselves proved nothing and would have required the support of parol or other evidence, to have made them evidence for any purpose. The best evidence of the relative numbers of the good to the bad eggs was the testimony of the men who handled them. The slips of paper and entries in the books were but collateral and incidental circumstances, constituting mere links in the chain of the evidence. They were but collateral and incidental matters proper to be used in testing the accuracy of testimony given by those who claimed to have examined and counted the eggs.

General footings, or aggregate amounts, may be testified to by a witness who is familiar with them, for the purpose of testing the accuracy of more detailed statements in the evidence, or when necessary to make out a merely *prima facie* case. *Thornburgh v. New Castle, etc., R. R. Co.*, 14 Ind. 499; 1 Greenl. Ev., sections 117, 118, 119 and 120. There was no error, therefore, in permitting the question to which objection was made to be answered.

One Foster was *candler* for the plaintiff at the time the eggs were examined and packed in barrels preparatory to being stored in the warehouse, and he testified to having had eight or nine years experience as a *candler*, and in the handling of eggs. He was not called as an expert, but was examined as to the number and quality of the eggs which went into the warehouse, and as to facts generally coming to his knowledge while in the plaintiff's employment.

The defendants, at the proper time, called one Budd as a witness, who testified that he had been in the business of buying, handling and selling eggs and butter for twenty-one years; that he was acquainted with Foster; that he had had Foster in his employment three or four years previously.

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The defendants thereupon proposed to prove by Budd that Foster was neither an expert nor a competent person for the *candling* of eggs, but the court declined to allow the proposed proof to be made, upon the ground that the time of Foster's employment by Budd was too remote; and, in that respect, we know of nothing which would sustain us in holding that the court did not decide correctly. In such cases the remoteness or proximity of the time indicated, relatively speaking, rests very much in the discretion of the *nisi prius* court.

One Neal was also a *candler* for the plaintiff when a considerable part of the eggs were examined and assorted, after they were withdrawn from the warehouse. He testified to having had experience as a candler of eggs, and to the general condition of the eggs and barrels containing them which he examined.

Budd further stated that he was acquainted with Neal personally; also, with Neal's reputation amongst his neighbors and business associates as a candler and handler of eggs. The defendants then offered to prove by Budd that Neal's reputation in that respect was bad amongst his neighbors and those having business associations with him, but the court refused to permit the proffered proof to be made, upon the ground that such proof was not admissible, either to show Neal's incompetency or to impair the value of his testimony. When a person is admitted to testify as an expert merely, the manner in which, and the extent to which, his competency as an expert may be questioned, is a subject upon which there is some obscurity in the authorities, but, although referred to in argument, the subject is one not directly involved in the proper decision of this cause. *Laros v. Commonwealth*, 84 Pa. St. 200; *Ordranax Jurisp.*, section 117; *Whart. Crim. Ev.*, section 409.

Proof of reputation, as a general rule, applies only to the relations which a party sustains in some respect to the public, and to such things as, from their very nature, are ordinarily incapable of the usual means of proof, such as pedigree, re-

lationship, character, prescription, custom, boundary, reputed ownership and general rumor. It is admissible to establish what has generally, but imperceptibly, come to be recognized as an existing condition or state of affairs touching some matter to which the attention and observation of society have been directed, and concerning which there has been a concurrence of many voices, but not to prove what a party's relations are to a limited number of persons, or what his qualifications may be for some merely private pursuit, or whether he is skilled in some particular employment. These are matters susceptible of direct proof, and the usual means to establish them must be resorted to. *Starkie Ev.* 45; 1 *Greenl. Ev.*, section 101; *Walker v. Moors*, 122 *Mass.* 501; *Best Princ. Ev.*, section 497, *et seq.* It follows that the proposed evidence, as to the reputation of Neal as a candler and handler of eggs, was properly excluded.

One of the instructions given by the court to the jury, known as No. 8, first enumerated many circumstances which they ought to take into consideration in assessing the plaintiff's damages, in the event that they found for him, and concluded as follows: "The plaintiff is, however, entitled to recover the highest market price he could have obtained at the time of the injury for the goods, had the defendants fully performed their duty and properly preserved the goods during the time they were bound under their contract to keep them in storage."

There is some obscurity in the phraseology of this instruction, when considered with reference to its application to the evidence, but we construe so much of it as is set out above, when taken in connection with what preceded it, to have meant that in making up the amount of damages, in the event of a finding for the plaintiff, the eggs should have been estimated at the highest market price which the plaintiff could have obtained for them, whether by shipment or otherwise, at the time they were injured.

The authorities bearing directly upon the question in-

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volved are very meager, but, as thus construed, and judged of in the light of all the analogies which occur to us, the instruction can not be sustained. The jury ought to have been told that in assessing the damages, the eggs should have been estimated according to their market value in the city of Indianapolis, when they were injured.

The rules for the assessment of damages in actions of trover, for breach of a contract to be performed at a particular place, and for injuries to goods *in transitu* by common carriers, concurrently sustain us in the conclusion we have reached, adverse to the correctness of the instruction set out in part as above. Besides, when the market is fluctuating and the precise time somewhat indefinite, the average range of prices about the time inquired of affords the proper standard of the market value of a commodity. 2 Sutherland Dam. 374.

Various general and, in some instances, hypothetical questions were asked of witnesses by the defendants concerning the business of buying, handling and storing eggs, which tended, in a greater or less degree, to test the accuracy of some of the statements made by witnesses for the plaintiff, but were held to be improper questions by the court. We will not attempt to set out, or comment in detail upon, any of those questions, as the judgment must, at all events, be reversed.

It is sufficient for our present purpose to remark that, in our opinion, some of those questions were erroneously excluded, and that, in consequence, the defendants were not, in some instances, allowed the latitude to which they were entitled in their efforts to break the force of some of the testimony produced against them.

The judgment at general term is reversed, with costs, and the cause remanded with instructions to reverse the judgment at special term.

Filed Jan. 30, 1885.

Benjamin *et al.* v. Webster.

No. 12,085.

BENJAMIN ET AL. v. WEBSTER.

100	15
141	463

MUNICIPAL CORPORATION.—*Law of Incorporation.*—*Ordinances.*—*Fire Board.*
—Delegation of Powers and Duties.—*Chief Engineer of Fire Department.*—
 The common council of a city, incorporated under the general law of this State for the incorporation of cities, is not authorized to pass ordinances which contravene the express provisions and the clear implications of the statute under which the city is incorporated. The creation of a fire board is unauthorized and is impliedly forbidden by the statute; and the attempt by ordinance to invest such fire board with powers and duties which the statute imposed upon the common council, or upon the chief engineer of the fire department, and which could not be delegated, is a palpable violation of the statute, and, therefore, invalid and void.

From the Marion Superior Court.

J. R. Wilson and *G. W. Spahr*, for appellants.

A. Boice, *R. O. Hawkins* and *C. S. Denny*, for appellee.

Howk, J.—The city of Indianapolis is a city incorporated under the general law of this State, approved March 14th, 1867, and the various laws since passed supplemental to or amendatory of such general law, and is, or ought to be, governed thereby. In section 3106, R. S. 1881, in force since March 10th, 1873, it is provided that the common council of such a city "shall have the power to enforce ordinances," on certain subjects and for certain expressed purposes, and among others, in the *thirtieth* clause of such section, "to regulate and protect fire engines, hose, hook and ladders." Besides the specific power to enforce ordinances, mentioned in such section, and in addition thereto, it is further provided in section 3155, R. S. 1881, in force since March 14th, 1867, that "The common council shall have power to make other by-laws and ordinances not inconsistent with the laws of this State, and necessary to carry out the objects of the corporation," etc.

On May 15th, 1876, the common council of the city of Indianapolis passed an ordinance organizing the "fire department." Section 2 of this ordinance provided that the com-

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mon council should elect three councilmen to serve and be known as the "fire board," of which board the chief of the fire department should *ex officio* be a member. After providing what officers and employees should constitute the fire department, and for the election by the common council of the chief and assistant-chief of the department, the ordinance then authorized the fire board to appoint all the other officers and members of the fire department. It was further provided that the fire board should have charge of all matters relating to the fire department, and have power to order all necessary repairs, and to make all needful rules for the regulation of the fire department. On May 28th, 1878, the city of Indianapolis having prior thereto, in conformity with law, passed under the government of a board of aldermen and a common council, certain sections of the ordinance organizing the fire department were amended so as to make the fire board to consist of one alderman and two councilmen, and the chief engineer of the fire department to be, as before, *ex officio* a member of such board. The amended ordinance also increased the number of the officers and employees of the fire department, and provided that all of them, except the chief fire engineer, should be appointed by the fire board and "hold their offices during good behavior."

On September 3d, 1879, another ordinance was passed, amending certain sections of the original ordinance organizing the fire department of the city of Indianapolis; but none of the provisions of this amendatory ordinance are material to any of the questions in this case, and they need not, therefore, be set out in this opinion. These were the ordinances of the city of Indianapolis in relation to the organization of the fire department and the "fire board" of such city, which were in force at the time the act of March 8th, 1881, supplemental to the general law of this State of March 14th, 1867, for the incorporation of cities, took effect and became a law.

Afterwards, on June 1st, 1881, the law-making power of the city of Indianapolis passed another ordinance, wherein it

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was provided, among other things, that the "fire board," as then provided for by ordinances of such city, should consist of three members, who should be members of the common council, and should be elected at the time and in the manner then required by law, and who should serve as members of such fire board during their terms of office as councilmen. On January 11th, 1884, the board of aldermen and common council of the city of Indianapolis met in joint convention, and then elected and appointed the appellants, Frank E. Benjamin, Joseph W. Wharton and George W. Spahr, then members of such common council, to be members of the "fire board" of such city, to serve as such during their terms of office as councilmen. Thereupon the appellants accepted such election and appointment, and were duly qualified as members of such fire board, and entered upon the discharge of their official duties and the exercise of their powers under the aforesaid ordinances.

In addition to the foregoing facts, the appellants, the plaintiffs below, alleged in their complaint that the appellee, Joseph H. Webster, then claimed the right to manage and control the fire department of the city of Indianapolis, and to perform the duties and exercise the rights, privileges and powers pertaining to appellants as members of the fire board of the city of Indianapolis; and that appellee was about to wrongfully and unlawfully usurp, or attempt to usurp, the rights, powers, duties and privileges of the appellants, as members of such fire board, to their injury and damage, and in violation of their obligations, rights, duties and privileges, as members of such board, and to the injury of the good government of the fire department of such city, etc. Wherefore, etc.

A temporary restraining order was granted, as prayed for. The appellee appeared, and, his motion to dissolve the restraining order having been overruled, he answered appellants' complaint in a single special paragraph. Appellants' demur-

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rer to appellee's answer was sustained by the court. Appellee excepted to this ruling, and, declining to amend or plead further, he was perpetually enjoined by the decree of the court at special term, in accordance with the prayer of the complaint.

On appeal the general term reversed the judgment at special term, and dissolved the temporary injunction, and from the judgment of the general term the appellants have appealed to this court.

In his answer to the complaint the appellee did not deny the passage of the several ordinances, recited in the complaint, creating the fire board of the city of Indianapolis, and prescribing the powers and duties of such board in relation to the fire department of such city; nor did he deny that the appellants were elected and qualified as members of such board. On the contrary, these matters were expressly admitted, but the appellee averred that he was and had been for more than two years past the duly elected, qualified and acting chief engineer of the fire department of the city of Indianapolis; that on May 24th, 1884, the common council and board of aldermen of such city had passed an ordinance repealing, in express terms, all the ordinances set out in the appellants' complaint; that afterwards, on July 14th, 1884, another ordinance was passed by the law-making power of such city for the organization of the fire department thereof, in which latter ordinance the powers and duties which had theretofore devolved upon the fire board were transferred to and conferred upon the chief engineer of the fire department; that such ordinance had never been repealed, amended or modified, and since the commencement of this suit was the only ordinance in force for the government of the fire department; and that since the passage of the latter ordinance the appellee had been, at all times, ready and willing, and had claimed the right, as chief engineer of the fire department, to carry out its provisions.

We are of opinion that this answer stated a full and com-

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plete defence to the appellants' complaint, and that the demurrer thereto ought to have been overruled. The chief engineer of the fire department is a city officer, provided for in the general law of the State for the incorporation of cities. Section 3098, R. S. 1881. In section 3201, R. S. 1881, in force since March 14th, 1867, it is provided that "The chief engineer shall have the superintendence of the fire department. He shall see that all apparatus for the extinguishment of fires, belonging to the city, is kept in proper order, and, from time to time, report to the common council the condition of the same, and the repairs or additions thereto to render the department efficient. He shall appoint a first and second assistant engineer, with the advice and consent of the common council, who shall act under his directions."

It seems to us that these statutory provisions must have been overlooked by the law-making power of the city of Indianapolis in the passage of the several ordinances set out in appellants' complaint, for, in creating the fire board and in prescribing the powers and duties of such board, those ordinances certainly contravened the express provisions and the clear implications of the statute under which the city was and is incorporated. The creation of the fire board was wholly unauthorized by the statute, and it was impliedly forbidden thereby. Powers and duties were attempted to be given to such board, some of which the statute imposed upon the common council as a body, and some were the plain statutory duties of the chief engineer of the fire department.

But it is claimed by the appellants that the supplemental act of March 8th, 1881, referred to in their complaint, has so recognized the existence of boards authorized or required by ordinances of the city, as to vitalize and give validity to the ordinances providing for the creation of the fire board, and prescribing its powers and duties. Section 3054, R. S. 1881. We do not think so. The statute has reference to such boards only as had been lawfully created by ordinances of the city, and not to boards whose creation, powers and duties were un-

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authorized by the law for the incorporation of cities, and were in direct contravention of some of its provisions.

It is claimed also that the judgment of the general term, dissolving the temporary restraining order theretofore granted in the cause, was unauthorized by law, and, therefore, erroneous. This position is not well taken, and can not be sustained. In section 1360, R. S. 1881, in force since September 19th, 1881, express authority is given the general term to "render such judgment as may be deemed proper."

The judgment of the general term is affirmed, with costs.
Filed Jan. 21, 1885.

No. 9990.

GIPSON ET AL. v. OGDEN.

PRINCIPAL AND SURETY.—*Release by Extension of Time.*—*Judgment.*—Where there is a judgment against A. and B., which is a lien on real estate, and the creditor, having knowledge that A. is merely surety for B., by valid contract with B., extends the time of payment for a definite time without A.'s consent, the latter is released and may maintain a suit to relieve his land from the apparent lien of the judgment.

SAME.—*Consideration.*—*Chattel Mortgage.*—In such case, the execution by B. to the creditor of a mortgage on goods levied upon to satisfy the judgment, is a sufficient consideration to support the agreement to give time.

SAME.—In such case, the remedy exists though the fact of suretyship was not established by the judgment, as might have been done by virtue of the statute, inasmuch as the statute did not deprive the surety of rights existing at the common law and in equity.

SAME.—*Evidence.*—In such case, the general denial being pleaded, proof that the plaintiff was surety, and that the creditor had notice thereof, is essential.

SAME.—In such case, a covenant in the chattel mortgage to extend the time of payment until a day named, and that the mortgagor should have possession of the goods until that day, is proof of the agreement to give time.

From the Hendricks Circuit Court.

C. A. Dryer, T. J. Cofer and N. M. Taylor, for appellants.
L. M. Campbell, for appellee.

100	90
129	569
100	20
155	632

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ELLIOTT, J.—The appellee alleges in her complaint that she is the owner of real estate upon which a judgment owned by Eliza J. Gipson, as the assignee of James Gipson, constitutes a cloud which she has a right to have removed. It is alleged that the judgment was recovered against Moses Luckey and the appellee, before a justice of the peace; that, as the payee of the note on which the judgment was rendered and his assignee well knew, the appellee was the surety of Luckey; that a transcript of the judgment was filed in the clerk's office and thus became an apparent lien on the appellee's land. It is further alleged that, on the 22d day of July, 1879, Luckey was the owner of personal property subject to execution, of the value of \$140; that an execution was issued on the judgment and delivered to a constable, and the judgment was then assigned to Eliza J. Gipson. The complaint, after making the allegations we have summarized, proceeds thus: "On the 22d day of July, 1879, without the knowledge or consent of the plaintiff, the defendants entered into a new contract and agreement with said Moses Luckey, by which they agreed to and did extend the time of payment of said judgment until November 1st, 1879, and did take from said Moses Luckey a chattel mortgage on said personal property, which was recorded, and suffered and permitted said Luckey to retain and dispose of said property, without making any levy of execution upon the same, and suffered said execution to remain in the hands of said constable until October, 1879, relying upon the chattel mortgage aforesaid."

In the attack upon this pleading, counsel for appellants argue that it appears that there was mere passive inaction on the part of the creditor, and that this did not release the surety. We concur with counsel in their statement of the general principle, that mere inaction does not release the surety, for we think it well sustained by authority. *Vance v. English*, 78 Ind. 80; *Philbrooks v. McEwen*, 29 Ind. 347; *Brandt Suretyship*, sec. 374. But while the rule of law is well stated, the conclusion reached by counsel is radically wrong,

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for the reason that the complaint shows a new contract extending the time of payment of the judgment for a fixed period. There is more than inaction; there is action of a positive nature materially changing the rights of the contracting parties.

It is established law that a contract made with the principal debtor, without the consent of the surety, extending the time of payment for a definite period, releases the latter from liability. The pleading before us shows such a contract. The execution of the chattel mortgage was a sufficient consideration for the agreement of extension, and the agreement did extend the time of payment for a definite period. The authorities are well agreed that in such cases the surety is discharged. In *Wingate v. Wilson*, 53 Ind. 78, a judgment was rendered upon an agreement giving to the principal an extension of six months time, and this was held to release the surety. The case cited is one of many, differing only in the particular facts but identical in principle. *Menifee v. Clark*, 35 Ind. 304; *Jarvis v. Hyatt*, 43 Ind. 163; *Hamilton v. Winterrowd*, 43 Ind. 393; *Huff v. Cole*, 45 Ind. 300; *White v. Whitney*, 51 Ind. 124; *Bucklen v. Huff*, 53 Ind. 474; *Buck v. Smiley*, 64 Ind. 431; *Lemmon v. Whitman*, 75 Ind. 318; *Cates v. Thayer*, 93 Ind. 156.

Many authorities are cited to prove that where the creditor does nothing more than accept additional security, the surety is not released, and we have no disposition to run counter to this well settled doctrine. 2 Am. Leading Cases, p. 391. But, while granting the existence of this general doctrine, we deny its applicability here, for the reason that the facts pleaded show that there was a new contract and an extension of time until the 1st of November, 1879. It can not, therefore, be justly asserted that there was nothing more than the acceptance of additional security. There are few principles better settled than that a surety has a right to stand upon the strict letter of his contract, and that a change in its terms, whether beneficial or injurious, releases him from liability.

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It is argued that there was no release of the levy, and, therefore, no injury done the surety. This argument does not meet the case. If there had been mere passiveness, and no release of the lien, there would have been much force in counsel's contention. But there was more than mere passiveness; there was a radical change in the terms of the contract. The case does not turn upon the question whether there was a release of a lien; the pivotal point is whether there was or was not a change in the terms of the contract. Where, as here, there is a change in the terms of the contract, the courts are bound to hold the surety discharged without inquiring whether the change was or was not beneficial to him. The conclusion to which all the cases lead is, that a surety is released if the creditor fetters himself by a contract extending the time of payment, and judicial investigation ends with the ascertainment of that fact, without prosecuting an inquiry as to whether the surety lost or gained by the change. Counsel wander from the real question in quest of authority to prove, what is not denied, that mere passiveness working no injury does not operate to release the surety; for the question is, did not the change in the terms of the original contract by the new agreement, founded on the additional security supplied by the chattel mortgage, operate to discharge the surety?

It is strenuously contended that the appellee can not avail herself of the fact that she was surety, because she did not litigate that question in the action before the justice of the peace. The case of *Reissner v. Dessar*, 80 Ind. 307, does not decide the question here involved, for there a third party had acquired rights upon the faith that all the judgment debtors were principals; while here the question is between parties having full knowledge of all the facts. It is obvious that parties possessing ample information are not so favored as those who are induced to alter their position upon the faith of the record. In *Boys v. Simmons*, 72 Ind. 593, the party claiming to be surety paid the judgment, and then sought to enforce it against his co-debtor, upon the ground that the lat-

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ter was the principal, but the court held that he was not entitled to do this, because the question of suretyship was not determined in the original action. The decision, as the reasoning in the opinion shows, was put upon the ground that the remedy sought by the surety was a purely statutory one, and as he had not pursued the course prescribed by the statute, he was not entitled to the remedy he invoked. That decision, it is quite clear, does not govern this case, for here the surety is not seeking the benefit of the statute, but is relying upon the rights vested in him by the general principles of law and equity. Neither of these cases decides the point which here demands consideration, and we must look elsewhere for principles and authorities.

In our judgment, the statutory method of determining the question of suretyship is only exclusive in cases where the surety seeks to avail himself of a purely statutory remedy. In cases where the surety seeks to avail himself of the benefit of general legal and equitable principles, he may pursue the course recognized by the courts and is not confined to the statutory method of procedure. In *Harker v. Glidewell*, 23 Ind. 219, it was held that a surety might sue and recover from his principal the money paid for him, and in the course of the opinion it was said: "The statutory provisions, sections 674-677 of the code, furnish an easy and convenient remedy for sureties, but the remedy existing at common law is not thereby taken away." This statement of the rule was approved in *Zook v. Clemmer*, 44 Ind. 15, and is, indeed, recognized in that class of cases which hold that a surety who pays the debt is entitled to subrogation. In the decisions upon that subject, and there are a great many of them, we have found no intimation that the right to subrogation can only be made available in cases where the question has been determined in the statutory method, and yet, if that method governs in all cases, it must govern in cases of subrogation. In *Scherer v. Schutz*, 83 Ind. 543, the extract made by us from *Harker v. Glidewell*, *supra*, is quoted with

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approval, and applied to a case where judgment had been rendered, without any issue as to the question of suretyship, against three persons, and two of them sought to recover upon the ground that they were sureties who had paid the debt of their principal. The case of *Leaman v. Sample*, 91 Ind. 236, strongly supports our proposition. In that case it was held that where one of two sureties made an issue that he was surety, and judgment went for him upon that issue, it did not conclude his co-surety who afterwards paid the judgment and sued to compel contribution. The case of *Harvey v. Osborn*, 55 Ind. 535, is also in point, and lends our conclusion strong support, *vide* opinion, p. 541.

It is firmly settled that a surety is not released by the extension of time unless the creditor had notice of the relationship, and it has been held that this rule applies where the assignee of the payee takes without notice that one of the makers is a surety. But this rule can not avail the appellant in his assault upon the complaint, for the reason that it charges that both the payee and his assignee had knowledge that the appellee was the surety of Luckey. There was no error in overruling the demurrer to the complaint.

The counsel for appellee, in discussing the questions presented by the motion for a new trial, assert that the extension of time to one of two joint obligors is a release of the other unless it appears that he consented to the extension. This position can not be maintained. Where the obligations of the promisors are equal, the creditor does not release one of them from liability by agreeing with the other debtor for an extension of time. *Mullendore v. Wertz*, 75 Ind. 431; *Davenport v. King*, 63 Ind. 64; *Neel v. Harding*, 2 Met. (Ky.) 247; *Shed v. Peirce*, 17 Mass. 623; *Wilson v. Foot*, 11 Met. 285.

It was essential to the appellee's case to prove that she was a surety on the note, and that the appellant had notice of the fact when he granted the extension of time to the principal debtor. It is not presumed, in favor of the surety, that the creditor had knowledge of the relationship. *Mullendore v.*

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Wertz, supra; *Davenport v. King, supra*; *Agnew v. Merritt*, 10 Minn. 308. In the present instance, both the note and the judgment on their face showed that the debtors were principals, and it would be palpably unjust to hold that the assignee of the judgment was bound to know, or to presume, that the relationship between the debtors was other than that which it appeared to be. The rule upon this subject is thus stated by a recent writer: "But where the note has been transferred to an assignee, an agreement between him and the maker, extending the time of payment, will not discharge the surety, unless he had, at the time, knowledge of the relation; and this the surety must allege and prove." Baylies Sureties and Guar. 256. In *Williams v. Scott*, 83 Ind. 405, it was said of an instruction given by the court, that "The instruction was also insufficient, in that it did not require the jury to find that the appellee had notice that VanGordon was a surety at the time of the agreement for an extension of time." These authorities are in line with many decisions of this court. *McCloskey v. Indianapolis M. & C. Union*, 67 Ind. 86 (33 Am. R.76); *Arms v. Beitman*, 73 Ind. 85; *Lamson v. First Nat'l Bank*, 82 Ind. 21; *Tharp v. Parker*, 86 Ind. 102.

The court, in giving instructions and in refusing to give those asked by the appellants, assumed the law to be the reverse of what the authorities assert it to be, and in thus ruling committed error which must reverse the judgment. The affidavit filed by Mr. Dryer, stating what the appellant Eliza J. Gipson would testify to, was admitted to be true, and furnished evidence that she had no knowledge that the appellee had signed the note as surety. In this state of the evidence, a reversal can not be avoided, because the entire theory of the law adopted by the court was radically erroneous.

One other question will necessarily arise on another trial, and it is, therefore, proper to decide it. That question is as to the effect of the chattel mortgage. That instrument not only bound the appellant not to attempt to enforce collection of the judgment obtained before the justice of the peace un-

Forsythe *et al.* v. Kreuter *et al.*

til the first day of November, 1879, but also covenanted that the principal debtor and mortgagor should retain possession of the personal property subject to execution until that time, and thus doubly fettered the creditor. It is quite clear that where a creditor accepts from a principal debtor a chattel mortgage providing for an extension of time in which to pay the debt, and granting to the debtor a right to retain possession of the property subject to execution, the surety is released in cases where the suretyship was known, and where no consent to the extension of time was given by the surety.

The other questions discussed by counsel may not arise on another trial, and we do not deem it necessary to discuss them.

Judgment reversed.

Filed Jan. 24, 1885.

No. 10,689.

FORSYTHE ET AL. v. KREUTER ET AL.

HIGHWAY.—*Location.*—*Petition.*—*Jurisdictional Fact.*—*Appeal.*—*Practice.*—

In a proceeding for the location of a public highway, the fact whether the petition was signed by twelve freeholders, six of whom resided in the immediate neighborhood of the proposed highway, is jurisdictional, and the finding of the board of commissioners on that subject is conclusive. Objection to the petition for such reason can only be made before the board, before viewers are appointed, and it can not be made in the circuit court on appeal.

SUPREME COURT.—*Improper Argument of Counsel.*—*Bill of Exceptions.*—*Presumption.*—*Practice.*—Where alleged improper remarks of counsel to the jury are not preserved in the record by bill of exceptions showing that they were objected to, or what action the court took with respect to them, the Supreme Court will not consider them, but will presume, nothing appearing in the record to the contrary, that if the remarks were inappropriate, the trial court in some way set the matter right.

SAME.—*Judgment.*—*Motion.*—Where there is no bill of exceptions in the record showing that objection was made to the order and judgment of the trial court, or any motion to modify or change it, no question in relation thereto is properly before the Supreme Court.

From the Lake Circuit Court.

100	27
124	24

100	27
130	595
100	27
133	95

100	27
143	147
100	27
146	230
147	232

100	27
180	113
180	669

100	27
168	235

100	27
167	54

100	27
169	402

Forsythe et al. v. Kreuter et al.

J. E. McDonald, J. M. Butler, A. L. Mason, T. J. Wood
and — *Wood*, for appellants.

J. B. Peterson and *H. O. McDaid*, for appellees.

MITCHELL, J.—The record in this cause exhibits a proceeding for the location of a public highway, and for the assessment of damages. It was commenced by the petition of the appellee Kreuter and fourteen others before the board of commissioners of Lake county. After the viewers reported, Caroline M. Forsythe appeared before the commissioners and remonstrated against the granting of the road, as being of no public utility, and also for the assessment of damages. Proceedings were had before the board, which resulted in establishing the highway and assessing the remonstrant's damages at \$110. An appeal was taken to the circuit court, where a trial was had and a verdict returned by a jury, to the effect that the proposed highway was of public utility, and assessing the damages of Mrs. Forsythe at \$125. Overruling her motion for a new trial, the court ordered the cause to be remanded to the board of commissioners, with directions that the finding of the jury should be carried out, if they should deem the road to be of sufficient public importance, and adjudged that the remonstrant pay the costs, to which order and judgment she objected and excepted, and from which this appeal is prosecuted.

Three grounds of objection are urged by appellants' counsel in their brief:

1. That the evidence at the trial in the circuit court showed that the petition was not signed by twelve freeholders, "six of whom resided in the immediate neighborhood of the highway proposed ;"

2. That the appellees' counsel indulged in remarks to the jury during the progress of the trial, which were improper, and which were calculated to prejudice the appellants' cause ; and,

3. That the order of the court remanding the cause to the board of commissioners to carry out the finding of the jury,

Forsythe *et al.* v. Kreuter *et al.*

if they should deem the road of sufficient public importance, was unauthorized.

As to the first point, it is sufficient to say that the only issues tendered by the remonstrance were, that the proposed highway was not of public utility, and for the assessment of damages.

It is settled by the decisions of this court that nothing can be tried on appeal from the board of commissioners to the circuit court except what is put in issue before the board; and it is equally well settled that objections can only be taken to facts upon which the jurisdiction of the board depends, by appearing before the commissioners and making such objections at the time the petition is presented, and before the appointment of viewers. Whether the petition was signed by twelve freeholders, six of whom resided in the immediate neighborhood, etc., was jurisdictional, and the finding of the commissioners on that subject was conclusive. See *Green v. Elliott*, 86 Ind. 53, where the question is decided and the authorities cited by BICKNELL, C. C.

To the second point, we have to say, that as the extracts from the speech, in which it is claimed counsel for appellee transcended the bounds of propriety, are only set out in the motion for a new trial, and are in no way preserved in the record by bill of exceptions showing that they were objected to, or what the action of the court was in that regard, we can not consider the question. We must presume, nothing appearing to the contrary, that if the remarks attributed to counsel were inappropriate, the court in some way set the matter right.

As to the third point, we discover no bill of exceptions in the record showing that the appellant made any special objection to the form or substance of the order and judgment of the court, or that any motion was made to modify or change it. We must, following the rule announced in *Adams v. LaRose*, 75 Ind. 471, and many other cases, dispose of it in like manner.

Judgment affirmed, with costs.

Filed Jan. 22, 1885.

Johnson, Guardian, *et al.* v. Kitch *et al.*

No. 11,997.

JOHNSON, GUARDIAN, ET AL. v. KITCH ET AL.

JUDGMENT.—*Injunction.*—*Master Commissioner.*—Where, by agreement of parties in open court, there is a reference to a master to report the amount due from the defendants to the plaintiff upon a judgment in controversy, and the master reports the amount due, and judgment is rendered therefor, which judgment is paid by the defendants, the original judgment is thereby superseded, and its collection may be enjoined.

From the Grant Circuit Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. H. Moon, for appellants.

J. Brownlee, J. F. McDowell and E. Kitch, for appellees.

BICKNELL, C. C.—The complaint of the appellees alleges that in 1874 the appellant Johnson recovered a judgment against them for \$185.37 and costs; that they filed a bill to review said judgment; that in 1878 the parties to said bill appeared in open court and agreed that the matter in controversy between them as to how much, if anything, was due from the plaintiffs to the defendant on the judgment sought to be reviewed, should be referred to a master commissioner to take, state and report the amount due, the plaintiffs claiming that there was nothing due; that said master found and reported that only \$1.53 was due; that said report was confirmed by the court, and a judgment was rendered against said plaintiffs for \$1.53 and costs, which they paid; that by these proceedings said original judgment was rendered void; yet that said defendant Johnson has issued an execution on said original judgment to his co-defendant Eyestone, the sheriff, who is threatening to collect it. The complaint prays that said original judgment may be set aside, and the defendants enjoined, etc.

A demurrer to the complaint, for want of facts sufficient, was overruled.

The defendant Johnson answered in three paragraphs, of which the first was afterwards withdrawn. Demurrers to the

second and third of said paragraphs were sustained. There was no further pleading, and the court rendered judgment for the plaintiffs perpetually enjoining the collection of said original judgment. The defendants appealed. The rulings upon the demurrers present the only questions.

The appellants claim that the judgment for \$1.53 was a nullity; that on a complaint for review a judgment of reversal is not a final disposition of the suit, but leaves the action as if no trial had taken place; that the merits of the original cause can not be litigated in an action to review; that such an action can be maintained only for error of law apparent, or for material new matter, and that the entry of a second judgment in such a case is not a vacation of the original judgment. But these propositions, if conceded to be true, do not show that the complaint is insufficient.

Although it may be true that on a bill of review the merits of the original cause can not be litigated as of right, yet, when the parties appear and the court has jurisdiction, and the parties agree in open court that the matter in controversy may be heard and determined by a master, and it is so heard and determined, and a judgment is rendered upon the report of the master without objection, such a judgment is not a nullity, but will bind both parties until reversed or vacated.

The complaint avers that the parties appeared and in open court agreed that the matters in controversy, on the amount claimed in said suit on said bond, should be referred to John P. Campbell, who was then and there appointed a master commissioner to take, state and report the amount due from said Kitch, if anything, on account of said cause of action for which said judgment was so rendered, and that said Campbell heard said cause and matters, and found that instead of \$185.37, for which said judgment was rendered, there was due from said Kitch the sum of \$1.53 only, which finding was reported to and was confirmed by the court, who rendered judgment for \$1.53, instead of said judgment of \$185.37, and said judgment for \$1.53 was fully paid and satisfied.

Johnson, Guardian, et al. v. Kitch et al.

The complaint was sufficient; there was no error in overruling the demurrer to it.

The second and third paragraphs of the answer are substantially the same; they aver that the original judgment for \$185.37 was obtained in 1874; that Kitch and Fox, at September term, 1874, filed a bill of review; that a demurrer to their bill of review was sustained, and that judgment was rendered against them on the demurrer, from which judgment they appealed to this court, where the judgment of the court below was affirmed in May, 1876; that afterwards said Kitch and Fox, in 1877, commenced another action to review said original judgment; that in this last action no issue was joined, and no judgment was rendered reversing said original judgment; wherefore said original judgment is in full force, etc.

These were not sufficient answers. Although the original judgment had been affirmed on a bill of review, and although Kitch and Fox could not have maintained a second bill of review, if objected to, yet, if the parties were before a court having jurisdiction, and there agreed that the matters in controversy, on which the original judgment was rendered, should be opened and referred to a master to hear and determine what, if anything, was due upon the matter on which said original judgment was rendered, and if the master made and reported his finding, and the same was confirmed by the court, and followed by a judgment without objection for \$1.53 instead of the original judgment for \$185.37, then the fact that said second bill of review might have been objected to and dismissed is no defence to a suit to prevent the collection of the original judgment thus superseded.

We find no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Feb. 12, 1885.

Johnson, Guardian, *et al.* v. Kitch *et al.*

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The only questions presented relate to the sufficiency of the complaint and the sufficiency of the second and third defences.

The defendants were seeking to enforce an old judgment against the plaintiffs. In the present suit the plaintiffs prayed for and obtained an injunction against the enforcement of that judgment.

In their complaint they alleged that there was nothing due on the judgment; that they had filed a bill to review it, and that the parties thereto appeared and in open court agreed that the whole matter in controversy between them as to how much, if anything, was due from the plaintiffs should be referred to a master; that said master reported the amount due as \$1.53; that his report was confirmed by the court, and that judgment was rendered thereon against the plaintiffs for \$1.53 and costs, which judgment they paid. This was a good complaint; if true, the appellant ought to have been enjoined from collecting the old judgment.

The second and third defences alleged, in substance, that the original judgment was obtained against the present plaintiffs in 1874; that they filed a bill to review it in September, 1874; that a demurrer to said bill was sustained by the circuit court, whose judgment was affirmed by this court on appeal; that the present plaintiffs in 1877, commenced another action to review said original judgment, and that in this last action no issue was joined, and no judgment was rendered reversing the original judgment. These defences do not meet the substance of the complaint.

If there were such an agreement and such action thereon as stated in the complaint, it is not material whether there was a formal issue or an express reversal of the original judgment. If the parties in open court consented to a reference of their controversy as to the amount due to a master, who

 Pixley *et al.* v. VanNostern.

reported \$1.53 only, and if on the confirmation of his report judgment was rendered for \$1.53 and costs, which judgment was paid, it would be inequitable to enforce the original judgment.

The petition ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed April 2, 1885.

 No. 11,933.

PIXLEY ET AL. v. VANNOSTERN.

PROMISSORY NOTE.—*Party in Interest.*—*Plea in Bar.*—In an action on a promissory note by the endorsee, a verified answer by the makers, admitting the execution of the note, but alleging that the payee was still the owner thereof, and that the plaintiff had no interest in it other than as the agent and trustee of the payee, who was the real party in interest, and that the note was assigned to the plaintiff only for the purpose of collection, is a plea, not in abatement, but in bar.

From the Delaware Circuit Court.

R. S. Gregory and *A. C. Silverburg*, for appellants.

G. H. Koons, for appellee.

BLACK, C.—Action by the appellee against the appellants upon a promissory note executed by the latter to one Mary E. Warner, and by her endorsed to the appellee. The appellants answered, admitting the execution of the note to the payee named therein, but alleging that she was then, and ever since the execution of the note had been, the owner thereof in her own right; that the plaintiff had not, and never did have, any right, title or interest in or to said note other than as the agent and trustee of said payee; that the note was assigned to the plaintiff for the purposes of collection and not otherwise; and that said payee was the real party in interest. This answer was verified by the affidavit of one of the defendants.

The plaintiff replied by general denial. The court tried

100	34
131	41
100	34
143	620

100	84
150	345

Hereth v. Hereth et al.

the cause and found for the plaintiff, assessing his damages, and rendered judgment accordingly.

All the questions that the appellants have sought to present for our decision resolve themselves into one, which is whether the answer was in bar or in abatement, it being contended on behalf of the appellants that it was the latter. This position of the appellants can not be sustained. *Swift v. Ellsworth*, 10 Ind. 205; *Wilson v. Clark*, 11 Ind. 385; *Lewis v. Sheaman*, 28 Ind. 427; *Hereth v. Smith*, 33 Ind. 514. We find no error.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed at the costs of the appellants.

Filed Jan. 22, 1885.

No. 11,040.

HERETH v. HERETH ET AL.

100	35
134	411

ASSIGNMENT OF ERRORS.—*Marion Superior Court.*—*Practice.*—In an appeal from the Marion Superior Court, error can only be assigned upon the judgment at general term affirming or reversing the judgment at special term, and this presents to the Supreme Court only such questions as were presented to the general term.

VERDICT.—*Special Findings.*—*Venire de Novo.*—*Practice.*—Contradictory answers by the jury to interrogatories, the general verdict being in due form, will not justify judgment notwithstanding the general verdict, nor the award of a *venire de novo*.

BILL OF EXCEPTIONS.—*Instructions.*—*Practice.*—Under the code of 1852 a cause was tried at the May term, and a motion for a new trial overruled at the October term, when sixty days time was given in which to file a bill of exceptions, which was filed accordingly.

Held, that this bill could not bring into the record instructions or exceptions thereto.

From the Marion Superior Court.

J. Coburn, for appellant.

C. A. Ray, F. Knefler and J. S. Berryhill, for appellees.

BEST, C.—The appellant brought this action against the appellees to perpetually restrain them from obstructing a

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private way. An answer of four paragraphs was filed. A separate demurrer to the first, second and third paragraphs was overruled and a reply filed. The issues were tried by a jury, and a verdict, with answers to interrogatories, was returned for the appellees. Motions for judgment notwithstanding the general verdict, for a *venire de novo*, and for a new trial, were severally overruled, and judgment was rendered upon the verdict. An appeal was taken to the general term, where the judgment was affirmed, and from such judgment this appeal has been taken.

The first four assignments of error in this court question rulings made by the superior court in special term, and as no question can thus be raised, as has heretofore been decided, no further notice will be taken of such assignments. *Indianapolis, etc., Union v. Cleveland, etc., R. W. Co.*, 45 Ind. 281. The remaining assignment alleges that the court erred in affirming the judgment, and this assignment calls in question the ruling of the court upon the errors assigned in the general term.

It is first insisted that the court erred in overruling the appellant's demurrer to the fourth paragraph of the appellees' answer. This ruling was not assigned as an error in the general term of the superior court, and hence no such question is here presented by the record.

It is next insisted that the court erred in overruling the appellant's motion for judgment upon the answers of the jury to the interrogatories, notwithstanding the general verdict. Interrogatories were submitted by both parties, and the answers to those propounded by the appellant are, as he insists, favorable to him and inconsistent with the general verdict. These answers, however, are, as the appellant admits, contradicted by the answers returned to the interrogatories propounded by the appellees, and in this condition of the record the general verdict must prevail. Where answers to interrogatories are contradictory, they neutralize each other, and can not control the general verdict. This has several times been decided, and

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is not now an open question in this State. *Byram v. Galbraith*, 75 Ind. 134; *Keesling v. Ryan*, 84 Ind. 89; *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412; *Pennsylvania Co. v. Smith*, 98 Ind. 42.

The motion for a *venire de novo* is based upon the ground that the answers to the interrogatories are vague, indefinite and contradictory. This objection is not true in point of fact. The answers are definite and explicit. Every interrogatory is answered either "yes" or "no." The answers to some of the interrogatories are consistent with the appellant's claim, and are seemingly contradicted by answers returned to other interrogatories, but this fact furnishes no ground for a *venire de novo*. The general verdict for the appellees covered all the issues, and was in no respect defective or indefinite. In such case, contradictory answers to interrogatories can neither control nor otherwise affect the general verdict, and, therefore, furnish no cause for a *venire de novo*. *McElfresh v. Guard*, 32 Ind. 409; *Ogle v. Dill*, 61 Ind. 438; *West v. Cavins*, 74 Ind. 265; *Keesling v. Ryan*, *supra*.

The motion for a new trial is pressed upon the ground that the verdict is contrary to the evidence, and because the court, as is alleged, erred in giving and in refusing to give instructions. The evidence in this case is conflicting. This the appellant concedes by his argument, and though the preponderance may be with him, as he claims, we can not, as has often been decided, disturb the judgment upon a question requiring us to pass upon the mere weight of the evidence.

This cause was tried at the March term, 1880, and the new trial was denied at the October term thereafter. When this was done, sixty days' time was given within which to file a bill of exceptions, and in pursuance of this order a bill was filed embracing the evidence, the instructions given and refused, with a statement that the appellant had duly excepted to the action of the court in giving and refusing to give instructions. The instructions, the ruling of the court thereon and the appellant's exceptions thereto were not otherwise made

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a part of the record. - The bill of exceptions thus filed only brought into the record the evidence and the ruling of the court upon the motion for a new trial. It did not bring into the record the instructions nor the ruling of the court in giving or refusing any of them, and hence the record presents no question concerning them. *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110; *Indianapolis, etc., R. R. Co. v. Pugh*, 85 Ind. 279.

This disposes of all the questions in the record, and, as no error appears, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

ELLIOTT, J., did not participate in the decision of this cause.

Filed Jan. 22, 1885.

No. 11,753.

HYLER v. HUMBLE.

PLEADING.—Complaint.—Answer.—Written Instrument.—Where an answer sets up a different lease from that declared on in the complaint in the cause, it can not be considered in determining the sufficiency of the complaint on demurrer.

SAME.—Mistake.—Reformation.—An answer, stating a lease differing in terms from that declared on in the complaint and contradictory thereof, but not averring a mutual mistake and asking reformation, is bad on demurrer.

SAME.—Lease.—Subsequent Parol Agreement.—Consideration.—In an action for possession of real estate under a written lease, an answer which sets out a subsequent parol agreement to execute notes with security for the payment of the rent, but does not show any consideration for the subsequent agreement, so as to make it supersede the written agreement and, bar the plaintiff's right of possession until the notes were executed, is bad on demurrer.

From the Vigo Circuit Court.

W. Eggleston and E. Reed, for appellant.

B. E. Rhoads and E. F. Williams, for appellee.

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FRANKLIN, C.—Appellee sued appellant for the possession of certain real estate under a lease.

A demurrer to the complaint was overruled. The defendant filed an answer in four paragraphs. A demurrer was sustained to the first and fourth paragraphs, and overruled as to the third. A reply was filed to the third. There was a trial by the court, finding for the plaintiff, and over a motion for a new trial judgment was rendered upon the finding.

The errors assigned are the overruling of the demurrer to the complaint, and sustaining demurrers to the first and fourth paragraphs of answer. The objection to the complaint is that it does not aver performance of a condition precedent in the lease. Appellant is certainly mistaken in this objection. The lease, as made a part of the complaint, contains no condition precedent to be performed. The lease declared on is not the lease as set up in the answer, and the lease as contained in the answer can not thereby be made a part of the complaint, so as to raise this question by a demurrer to the complaint. There was no error in overruling the demurrer to the complaint.

The first paragraph of the answer states a lease containing different terms from the written lease declared on, and in some respects contradictory thereto, but does not aver a mutual mistake in the written lease, and ask to have the same reformed. There was no error in sustaining the demurrer to this paragraph of the answer.

The fourth paragraph of answer sets forth a subsequent parol agreement to execute notes, with good security, for the payment of the rent. This paragraph does not show any consideration for this subsequent parol agreement, so as to make it supersede the written agreement and bar the plaintiff's right to possession until the notes were so executed. There was no error in sustaining the demurrer to this paragraph of answer.

Under the third paragraph of answer, to which the demurrer was overruled, the defendant had ample opportunity, under

 Shoemaker v. Smith.

the charges of mutual mistake and the prayer for reformation, to introduce upon the trial all the facts in evidence necessary to establish the true contract, and to have a fair trial of its merits.

We find no error in this record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be affirmed, with costs.

Filed Jan. 22, 1885.

 No. 11,284.

SHOEMAKER v. SMITH.

COSTS.—How Reversal of Judgment Controls Liability.—Interlocutory Order.—

Where, upon appeal from an interlocutory order appointing a receiver, the order is reversed because a motion for change of judge had before been overruled, and the cause remanded with directions to grant the change, the appellant recovers costs below accruing after the refusal of the change until the order appointing the receiver, but not those accruing after such appointment.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellant.

J. H. Loudon and *R. W. Miers*, for appellee.

Howk, J.—After this cause was at issue, it was submitted to the court for trial, and, at the request of the parties, the court made a special finding of facts and stated its conclusions of law thereon. Over the exceptions of the appellant, the plaintiff below, to the court's conclusions of law, judgment was rendered in accordance therewith.

In this court the appellant has assigned error which calls in question the correctness of the trial court's conclusions of law upon the facts specially found.

The facts found by the court were, substantially, as follows: On the 23d day of August, 1878, the appellant filed his com-

100	40
123	57
100	40
146	286
100	40
150	102
100	40
165	355

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plaint in the court below alleging the existence of a partnership with the appellee, and praying for the dissolution thereof, with other proper relief. At the next term of the court appellee appeared to that action, and before the cause was at issue a day was fixed by the court for the trial thereof at that term, and the appellant subpoenaed and had in attendance certain witnesses to prove the issues in his behalf, whose total attendance at that term amounted to twenty-nine days, and whose total fees and mileage amounted to the sum of \$39.25. The cause was not tried at that term, but it was continued generally. At the January term, 1879, of the court, on January 15th, 1879, the appellee filed an answer and cross complaint, and a demurrer to such cross complaint was overruled. On the 24th day of that term appellant's motion for a change of judge was overruled, and on the 26th day of the term, over appellant's objections, the court appointed a receiver for the firm, from which order the appellant prosecuted an appeal to the Supreme Court. At that term the cause was set down for trial on a day of the term fixed by the court, and the appellant subpoenaed twenty-two witnesses, who were in attendance, and whose fees and mileage amounted to the sum of \$236.60. All of these witnesses were in attendance on the 24th day of the term, when the motion for the change of judge was filed, and on the 25th and 26th days of the term, on which latter day the action of the court appointing a receiver was had. After the appointment of the receiver and the appeal therefrom, and pending such appeal, the cause was continued generally from term to term until the September term, 1881, of the court.

At the May term, 1881, of the Supreme Court, the aforesaid appeal was decided, and it was adjudged by that court "that the judgment be and is in all things reversed, at the costs of the appellee, and the cause is remanded with instructions to sustain the demurrer to the cross complaint and the motion to change the venue." *Shoemaker v. Smith*, 74 Ind. 71. After the cause was remanded, the opinion was entered on the order-

Shoemaker v. Smith.

book of the court below, and judgment was there rendered in accordance with the mandate of the Supreme Court. The cause was then continued from term to term until the adjourned April term, 1882, when a trial was had, and a judgment was rendered in appellee's favor for \$500, and that each party pay the costs by him made except as to the costs theretofore already adjudged. Thereafter the parties each paid the costs made by himself, except as to the costs of appellant's witnesses at the September term, 1878, and the January term, 1879, with the clerk's costs for issuing subpoenas for the same at such terms, and the sheriff's costs for serving such subpoenas. Such unpaid clerk's costs were \$5, and such unpaid sheriff's costs amounted to \$20. The clerk divided the costs of the continuances after and including the January term, 1879, when the change of judge was applied for, and up to the term when the opinion of the Supreme Court was returned, equally between the parties, and each of them paid the costs of such continuances taxed against him. The judgment recovered by appellee against appellant was still unpaid, except the sum of \$162.85 paid January 9th, 1883. The appellee had paid the costs of his own witnesses, but had not paid to or for the appellant any of his costs for bringing his witnesses into court, or any of the fees of such witnesses. Appellee had paid all the clerk's costs incurred at the January term, 1879, after the overruling of the motion for a change of judge.

Upon the foregoing facts the court stated its conclusions of law, substantially, as follows:

1. Under the judgment of the Supreme Court, awarding costs to appellant on the judgment of reversal, the appellant was entitled to have taxed against the appellee, and to recover as a part of said judgment, the fees of appellant's witnesses, who were in attendance on the 25th and 26th days of the January term, 1879, amounting to \$55 in all.

2. Under said judgment the appellant was not entitled to have taxed against appellee, or to recover of him, any

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of the clerk's or sheriff's costs in summoning witnesses for the September term, 1878, or for the January term, 1879, or any of the costs of such witnesses at such September term, or at such January term except as to the two days' attendance of the witnesses after the change of judge was denied.

3. Appellant was not entitled to recover the costs of attendance of his witnesses on the 24th day of the January term, 1879, on which day the motion for change of judge was overruled.

4. Appellant was not entitled to recover, under the judgment of the Supreme Court, for the costs paid by him of the continuances of the cause thereafter had.

5. Appellant was not entitled to recover of the appellee, under the judgment of the Supreme Court, the costs of the clerk of the court below, made at the January term, 1879, after the overruling of the motion for a change of judge, which had already been paid to the clerk by the appellee.

6. Appellant had the right to have the amount of the costs, which were properly taxable under the judgment in his favor of the Supreme Court, to wit, the sum of \$55, with interest thereon from May, 1881, set off against appellee's judgment against him.

7. Upon the whole case, there ought to be a finding and judgment that there was due the appellant on his judgment for costs against the appellee, ordered by the Supreme Court, the sum of \$60, principal and interest, and that the same ought to be credited as a set-off and satisfaction *pro tanto*, upon appellee's judgment against the appellant.

Appellant excepted to each of the court's conclusions of law except the *first* and *sixth*, which were in his favor. The appellee excepted to the *first* and *sixth* conclusions of law, but he has not assigned any cross error, and, therefore, we are not required to consider the correctness of these conclusions.

The case is before us solely on the special finding of facts and the exceptions reserved to the second, third, fourth, fifth and seventh conclusions of law. In such a case, as we have

Shoemaker v. Smith.

often decided, the appellant admits, for the purposes of his exceptions, that the facts of the case have been fully and correctly found; but he says, that the trial court has erred in its application of the law to the facts specially found in the conclusions of law excepted to. *Cruzan v. Smith*, 41 Ind. 288; *Robinson v. Snyder*, 74 Ind. 110; *Fairbanks v. Meyers*, 98 Ind. 92.

It will be observed that the trial court has based each of its conclusions of law in this case upon the judgment for costs which the appellant recovered against the appellee in this court in the former case, between the same parties, of *Shoemaker v. Smith*, 74 Ind. 71. It will also be observed that the court has not found, as a fact, that in the former suit between the parties any judgment for costs was rendered by the court below in favor of appellee and against the appellant, at or before the making of the order for the appointment of a receiver, from which order the appeal was taken to this court in the case last cited. Indeed, we think it is shown in the special finding of facts that in the former suit no judgment for costs was ever rendered by the court below in favor of either party until the cause was finally disposed of, and long after the determination of the appeal therein to this court. Of course, therefore, the appeal to this court was not taken by the appellant from any judgment of the court below against him for costs, for there was no such judgment from which an appeal could have been taken. The appeal was taken from the order for the appointment of a receiver, and there is, at least, room for doubt as to whether or not the reversal of that order could or would entitle the appellant to recover any costs for the attendance of witnesses in the main action, which was continued from term to term, and was not tried until after the appeal was determined. This question is not before us, and is not decided.

In section 664, R. S. 1881, which is a substantial re-enactment of section 573 of the civil code of 1852, it is provided that "when the judgment is reversed in whole, the appellant

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shall recover costs in the Supreme Court and in the court below, to the time of the first error for which the judgment is reversed." It is manifest that the trial court was governed by this provision of the code in its conclusions of law, and there is no error in these conclusions of which the appellant can complain. *Doyle v. Kiser*, 8 Ind. 396; *Winton v. Conner*, 24 Ind. 107; *Eigenmann v. Kerstein*, 72 Ind. 81.

The judgment is affirmed, with costs.

Filed Jan. 23, 1885.

No. 11,629.

BOWEN v. STRIKER ET AL.

PLEADING.—*Bad Answer Sufficient for Bad Complaint.*—Where a demurrer is overruled to a bad answer, the plaintiff can not avail himself of the error if his complaint is insufficient.

TAX SALE.—*Failure of Title.*—*Rate of Interest.*—*Statute Construed.*—Under the proviso to section 3 of the act of March 5, 1883 (Acts 1883, p. 95), amending section 6497, R. S. 1881, which latter section repealed section 257 of the act of December 21, 1872, a purchaser at tax sales in 1867 and 1871, upon the failure of his title in a trial had after such act of 1883 went into effect, is entitled to recover interest only at the rate of six per cent. per annum, as provided by the statute in force at the date of such sales.

SAME.—*Tax Deed.*—*Must be Witnessed by County Treasurer.*—There can be no recovery of land under a tax title, even on a sufficient complaint, if the tax deed be not witnessed by the county treasurer, as required by the statute authorizing the execution of such deed.

From the Carroll Circuit Court.

J. Applegate and *C. R. Pollard*, for appellant.

L. B. Sims, *G. R. Eldridge* and *J. L. Sims*, for appellees.

NIBLACK, J.—Complaint by Abner H. Bowen against Peter Striker, Eliza Doggett, Dora Sampson, Anna Sampson and James Sampson to quiet title to two tracts of land in Carroll county. The plaintiff claimed to have become the purchaser of one of these tracts, and a part of the other, at

100	45
137	47
100	45
156	829
100	45
160	180

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a sale for delinquent taxes in February, 1867, and of what remained of the last named tract at a similar sale in February 1871, the taxes in each instance being assessed against Striker as the owner of the lands, and to have received tax deeds in pursuance of his several purchases in the year 1879, by reason of all which he was the owner of both of the tracts of land described in his complaint. The defendants, other than Striker, were summoned to answer as to some supposed after-acquired interests in the lands in controversy.

Upon a former appeal to this court, the judgment was reversed upon a question involving the construction of the statute of limitations. *Bowen v. Striker*, 87 Ind. 317. After the cause was remanded, the circuit court overruled demurrers to certain amended special paragraphs of answer, and after issue joined, both by answers in general denial, as well as upon the special paragraphs to which demurrers were overruled, the cause was submitted to the court for trial, when a finding was made that the plaintiff's title to the lands in dispute was invalid, but that there was due to him for purchase-money paid at the respective tax sales, and for interest which had accrued thereon, the aggregate sum of \$523.20, for which a judgment was rendered in his favor, declaring the sum of \$313.10 of such aggregate amount to be a lien upon one of the tracts of land, and the remaining sum of \$210.10 to be a lien upon the other tract.

The plaintiff, again appealing, assigns error upon the overruling of his demurrers to two of the amended special paragraphs of answer, upon the refusal of the court to grant him a new trial, and upon the form of the judgment which was rendered in his favor.

The special paragraphs of answer, to which it is insisted demurrers ought to have been sustained, tendered issues concerning the validity of the plaintiff's claim of title to the lands in suit. When this cause was before us upon the former appeal, we held that the complaint failed to show a full compliance with all the provisions of the statute regulating the

sale of lands for delinquent taxes, and that, for that reason, the plaintiff's title, based upon his purchases at the tax sales, was invalid. The conclusion then reached in respect to the invalidity of the complaint became the law of this case, and as the complaint has not been since amended, it must still be regarded as having constituted an insufficient claim of title to the lands. Conceding, therefore, the special paragraphs of answer to have been bad upon demurrer, the plaintiff had no cause to complain of the rulings of the circuit court upon them, since a bad answer is always a sufficient answer to a bad complaint.

It is claimed that the plaintiff ought to have been allowed interest on the amounts paid by him as purchase-money for the lands at the tax sales at the rate of twenty-five per centum per annum; that as interest was allowed him at a much less rate than twenty-five per cent., the amount found to be due him was too small, and that, on that account, the circuit court erred in refusing to grant him a new trial.

There is nothing in the record expressly showing the rate at which interest was computed in ascertaining the amount considered to be due the plaintiff upon his lien for taxes paid by him, but it is conceded in argument that the rate of interest allowed was much below twenty-five per cent. per annum. If section 257 of the act of December 21st, 1872, 1 R. S. 1876, p. 129, were still in force, then, under the construction given to that section in the case of *Flinn v. Parsons*, 60 Ind. 573, the plaintiff would have been entitled to interest at the rate of twenty-five per cent. per annum, but that section was repealed by the substitution of section 6497, R. S. 1881, which latter section has since been amended by the third section of the act of March 5th, 1883 (Acts 1883, page 95), with a proviso attached as follows: "*Provided*, That nothing herein contained shall be construed to increase the rate of interest allowed the purchaser, in case of failure of tax title, under the law in force at the time when such sale or sales were made. But in all such cases, if the title fails in any pro-

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ceeding, the purchaser shall recover the amount of taxes due on the land, with interest at the rate per centum per annum allowed by the law, in case of the failure of his tax title, in force at the date of such sale or sales." This provision, as will be observed, contains no saving clause as to suits then pending, or as to rights of action which had theretofore accrued. It became, therefore, applicable to and a rule of decision for all cases of the class to which it refers, which might be thereafter tried and determined. *Flinn v. Parsons, supra.* By the statute in force at the time the tax sales relied on by the plaintiff in this case took place, simple interest only was allowed to the purchaser in case of the failure of his tax title. 1 G. & H. 111, section 173. It follows, that at the time of the trial of this cause the plaintiff was not entitled to recover interest at a rate greater than six per cent. per annum, and that a new trial was properly refused on the ground upon which it was demanded.

The objection urged to the form of the judgment is that it should have been for the recovery of the lands, instead of for a specific sum of money and the enforcement of a lien upon the lands.

What we have said as to the insufficiency of the complaint as a claim of title to the lands, fully answers that objection. If, however, the complaint had been sufficient as a claim of title, the evidence failed to make a proper case for the recovery of the lands in at least one essential respect, and that was, the tax deeds read in evidence were not witnessed by the county treasurer as was and still is required by the statute authorizing the execution of such deeds. 1 R. S. 1876, 123, section 224.

The judgment is affirmed, with costs.

Filed Jan. 20, 1885; petition for a rehearing overruled March 20, 1885.

 Hadley et al. v. Milligan.

No. 11,814.

HADLEY ET AL. v. MILLIGAN.

100	49
138	148
180	284
100	49
140	390
100	49
150	313

PRACTICE.—*Marion Superior Court.*—Where, in the Marion Superior court in general term, errors are jointly assigned, the Supreme Court, on appeal, will not consider alleged errors against the parties severally.

PARTNERSHIP.—*Chattel Mortgage.*—*Assignment for Benefit of Creditors.*—Where a surviving partner executed a mortgage of the partnership assets to secure a firm liability, a complaint to foreclose the mortgage is sufficient, as against an assignee appointed subsequent to the execution of the mortgage, without showing any compliance with the statute by such surviving partner.

From the Marion Superior Court.

J. E. Florea and *A. W. Wishard*, for appellants.

H. J. Milligan, for appellee.

FRANKLIN, C.—Appellee sued appellants on two promissory notes and to foreclose a mortgage given on personal property to secure their payment. The notes bear dates of April 11th and April 24th, 1883, and the mortgage is dated May 25th, 1883.

The notes were executed by S. R. Hadley & Son, and were made payable to R. L. Scarlett, who assigned them by endorsement to appellee. The firm of S. R. Hadley & Son was a partnership, the members of which were Samuel R. Hadley and his son Cornelius N. Hadley. Samuel R. Hadley, the senior member of the firm, departed this life on the — day of May, 1883, and on the 25th day of May, 1883, Cornelius N. Hadley, as surviving partner of said firm, executed the mortgage in suit to appellee. On the 31st day of May, 1883, he also as surviving partner of said firm executed to appellant George W. Wishard, as assignee, an assignment of all the partnership property, including the property mortgaged, for the benefit of the partnership creditors, the partnership being insolvent; and appellee commenced this suit on the 8th day of June, 1883.

The defendants each filed a separate demurrer to the complaint, both of which were overruled.

The defendant George W. Wishard, as such assignee and

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trustee, filed an answer, substantially averring the death of said Samuel R. Hadley, and his selection as trustee by virtue of said assignment, and alleging that said Cornelius N. Hadley had not complied with any of the statutory provisions authorizing him as surviving partner to settle said partnership affairs; that the senior deceased partner was the owner of all the property, and the junior survivor had only invested therein his services; that the firm was insolvent, and there were numerous other unpaid debts; that the mortgage was void, and that the plaintiff had no lien on, or interest in, the mortgaged property as against this defendant.

To this answer a demurrer was sustained. The defendants elected not to plead further, and judgment was rendered upon the demurrers in favor of the plaintiff.

The errors assigned in the general term of the superior court were :

- 1st. The complaint does not state facts sufficient.
- 2d. Overruling Wishard's demurrer to complaint.
- 3d. Sustaining the demurrer to Wishard's answer.

No errors were separately assigned on behalf of Cornelius N. Hadley or Wishard; it was a joint assignment. The superior court in general term affirmed the judgment of the special term.

In this court appellants have separately assigned the following errors :

First. By Hadley. That the court in general term erred in affirming the judgment of the special term.

Fifth. By Hadley. That the court below had no jurisdiction of the subject-matter.

Second. By Wishard. That the court in general term erred in affirming the judgment in special term.

Third. By Wishard. That the court below had no jurisdiction of this defendant.

Fourth. By Wishard. That the court below had no jurisdiction of the subject-matter of the action.

Of the specifications of error filed here, this court can only

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consider the one filed by each appellant, that the court below in general term erred in affirming the judgment of the special term. And in considering that, the assignment of errors in the general term being joint, we can not consider the alleged errors against Wishard alone of overruling his demurrer to the complaint and sustaining the demurrer to his answer. There is only one joint error specified therein, and that is, that the complaint does not state facts sufficient to constitute a cause of action, and that presents the only question in the record for our consideration.

The complaint is in the usual form upon the notes, and for the foreclosure of the mortgage, alleging the death of one of the partners, and the execution of the mortgage by the surviving partner. We think the complaint is sufficient. And without the ruling upon the demurrer to the answer being properly before us, we think it unnecessary to voluntarily discuss and decide the main question discussed by appellants in their brief in relation to the rights, powers and duties of a surviving partner in the settlement of the partnership affairs, without complying with the provisions of the statute regulating the same. And without deciding anything in relation thereto, we may be excused for saying that we do not see wherein appellant Wishard occupies any better position therein than does appellee Milligan. If Cornelius N. Hadley, without complying with the provisions of the statute in relation to surviving partners, had no right or power to execute the mortgage to appellee, we do not see by virtue of what right or power he could execute the deed of assignment to appellant Wishard as trustee. What is fatal to the one would be fatal to the other in this respect.

We see no available error in this record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Jan. 9, 1885.

Ward v. Wilson et al.

No. 10,685.

WARD v. WILSON ET AL.

GUARANTY.—Notice.—Lease.—Pleading.—Demurrer.—A guaranty, written upon a lease and delivered with it, which recites that in consideration of the making of the lease and agreement that security should be given for the performance of the agreements contained therein on the part of the lessee, "I hereby undertake and agree to and with" the lessors, that the lessee "will do and perform all his agreements in said lease by him to be done and performed," signed by the lessee and the guarantor, is one of strict guaranty, and, as such, makes it the duty of the guarantee to give notice to the guarantor of the default of his principal; but the giving of such notice is not a condition precedent to the guarantee's right to maintain an action against the guarantor, and the complaint, to withstand a demurrer, need not aver notice, nor does the failure to give notice discharge the guarantor from liability except to the extent of damages he may suffer thereby, and this must be set up in defence.

SAME.—Matter of Defence.—If the failure of the lessors to be present at the end of the lessee's term to accept the surrender of possession is available to the guarantor at all, it can only be made so by answering that fact, coupling it with such other facts as would show injury to him; so, also, if the guarantor is injured by the subsequent conduct of the lessors in prosecuting suits against the lessee, or by accepting payment of damages, such facts are matters of defence.

From the Tippecanoe Superior Court.

R. P. Davidson, J. C. Davidson and T. B. Ward, for appellant.

H. W. Chase, F. S. Chase and F. W. Chase, for appellees.

MITCHELL, J.—All that need be stated in order to present the question for decision in this record is, that on the 22d day of August, 1876, the appellees leased certain premises in the city of Lafayette to one Telford, at an annual rental of \$600, payable in monthly instalments, for the term of one year, unless they should sell the premises, in which event the tenancy was to expire upon sixty days' notice.

The lease contained a stipulation that the lessee should "surrender the possession of said premises at the expiration

100	53
125	242

100	59
153	191

100	52
161	616

100	52
166	503
166	504

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of the tenancy in as good condition as they now are, natural wear and decay and unavoidable accidents excepted."

It was further stipulated that the performance of the agreements contained in the lease should be guaranteed to the lessors, and there was the usual stipulation that a failure to pay rent promptly should terminate the lease at the option of the lessors.

Before the lease was delivered there was written upon and delivered with it the following guaranty :

"In consideration of the making of the foregoing lease by Alexander Wilson, Joseph S. Hanna and Henry H. Hanna to James H. Telford, and agreement that security should be given for the performance of the agreements in said lease contained on the part of James H. Telford, I hereby undertake and agree to and with said Alexander Wilson, Joseph S. Hanna and Henry H. Hanna, that said James H. Telford will do and perform all his agreements in said lease by him to be done and performed. Dated Lafayette, August 23d; 1876.

"JAMES H. TELFORD.

"WM. L. WARD."

Telford went into possession under the lease, but failed at the end of the year to surrender. The appellees brought suit against him in the Tippecanoe Circuit Court for possession and damages, which resulted in a judgment in their favor for possession, and \$177.10 damages for the detention of the property. Telford then paid the judgment and costs, asked for and obtained a new trial, and the case was again tried on the 27th day of May, 1878, the result being another judgment for possession and \$164.44 damages against him. From this judgment he appealed to the Supreme Court, giving bond to stay proceedings meanwhile, where the judgment of the court below was affirmed February 15th, 1881. 71 Ind. 555.

Telford died in July, 1880, before the appeal was determined, his family remaining in possession until May 20th, 1881, when the appellees obtained possession.

These facts are set up in a complaint, filed against the ap-

pellant on his contract of guaranty above set out, which also charges that "by the failure and refusal of said James H. Telford to surrender the possession of said premises at the end of said term, to wit, August 23d, 1877, * * the plaintiffs were deprived of possession, use and rents thereof, from said 23d day of August, 1877, to the 20th day of May, 1881," which were worth \$2,400, and for which judgment was demanded.

A demurrer to the complaint was overruled, and exception duly taken.

The only question discussed by counsel for appellant relates to the ruling of the court upon the demurrer to the complaint, and no further statement of the case is pertinent, except to say that upon issues made trial was had, which resulted in a judgment for the appellees.

It is earnestly contended on behalf of the appellant, that his contract is one of strict guaranty, collateral to that of his principal, and that no action can be maintained thereon without first giving notice of the default of Telford, and that because notice is not averred in the complaint the demurrer should have been sustained. On the other hand, it is contended with equal emphasis by counsel for the appellees, that the contract was a direct and absolute engagement, binding the guarantor to the same extent as his principal, and that in any event he was liable without such notice.

The distinction between contracts of guaranty and suretyship has been repeatedly and accurately defined, and the nature of the obligation of each is stated with precision and certainty in the books, but, as to the circumstances under which a guarantor is entitled to notice of the default of his principal, there is irreconcilable conflict. The confusion mainly grows out of the form in which the contract is expressed, and the subject to which it is applied.

In some instances, a distinction is suggested and made between the case of a contract of guaranty, as applied to a commercial transaction, which is in the form of a letter of credit,

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or applied to the guaranty of a promissory note, and the case of a contract expressed in substantially the same language, as applied to an ordinary business affair.

The rule in regard to demand of payment and notice of default, as applied to commercial paper, is everywhere regarded as in no sense applicable to guarantors ordinarily. In the case of commercial paper, demand and notice, in order to fix the liability of an endorser or guarantor, are required by an arbitrary rule of the law merchant; while the rule requiring demand and notice to guarantors, of the character under consideration, rests upon the fact that it is the duty of the guarantee to notify the guarantor of the default of the principal, with a view of saving him from actual loss which may arise from want of convenient and certain means of knowledge. Outside of commercial paper, no good reason is perceived why the same set of words in a contract of guaranty should mean one thing when applied to one subject-matter, and the same words, expressing the obligation in substance the same, should mean another and different thing when applied to another subject-matter. Wade Notice, section 386. For instance, where the undertaking is entered into originally with the principal, and stipulates that a debt shall be paid, or some other act shall be done, it is not perceived why the subject-matter of the contract should, in any such case, be considered in determining the conditions upon which the guarantor, if properly speaking he can be called a guarantor, should be held liable. In all such cases he is liable at once, and without notice, upon default of his principal. In like manner, where the stipulation is to pay the debt or perform the contract of another, absolutely and at all events, whether entered into separately from the other or not, the same effect should, in all cases, be given to such contracts, and the obligor held liable, without notice of default. Such were the cases of *Frash v. Polk*, 67 Ind. 55; *Kirby v. Studebaker*, 15 Ind. 45; *Kline v. Raymond*, 70 Ind. 271; *Studebaker v. Cody*, 54 Ind. 586; *Cole v. Merchants Bank*, 60 Ind. 350; *Sample v. Martin*, 46

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Ind. 226; *Burnham v. Gallentine*, 11 Ind. 295; *Watson v. Beabout*, 18 Ind. 281.

In cases falling within either of the foregoing classes, neither failure to notify, lapse of time, insolvency of the principal, nor anything less than would exonerate a surety, will discharge a guarantor, either wholly or *pro tanto*, for the reason that in all such cases his contract is rather in the nature of a contract of suretyship, or a direct original personal undertaking, than that of a guarantor. When, however, the undertaking is not that the promisor will pay the debt or perform the engagement of another, but that the other will pay or perform, then different considerations are involved; and while it may be laid down as a rule that it is a duty incumbent on the guarantee in all such cases, to give notice to the guarantor of the default of the principal, yet, since that rule is founded upon the consideration of affording to the guarantor the means of saving himself from actual loss, by securing indemnity or otherwise, and not upon an arbitrary rule of law, it can not be said that it would be reasonable to hold that the same result must inevitably follow in such case as in the case of commercial paper, regardless of the fact that the guarantor may or may not have sustained injury by the failure to give such notice.

We are constrained to concur in the statement of an approved author, that "the current of modern American and English authority is against the observance of the distinction predicated simply upon the fact that the sum of the principal's liability actually incurred is uncertain." Wade Notice, section 423.

No adequate reason occurs to us for stating it as a rule, that a direct, unconditional agreement to pay for goods which may be delivered to a third person in the future, or the same kind of a contract to do any other thing which another has engaged to perform, may, by construction, be made conditional upon a notice of the default of such third person.

A direct, original contract, expressed in the same words,

should create the same liability under all circumstances, and should be enforced in the same manner and upon the same conditions, saving only the rights of sureties, whether it be the contract of principal, surety or guarantor, and if notice of future liability is to be relied on, it should be stipulated for in the writing, rather than that the courts should undertake to annex some condition of liability upon an absolute engagement, and where the engagement is not by its terms absolute, but collateral, by which we mean an engagement that some third person will pay a debt or fulfil a contract, since the obligation of the guarantor is not to pay the debt or do the thing contracted for himself, but to answer in damages for the default of his principal, we can see no reason why the character of the thing to be done should dispense with the duty to give notice.

We scarcely need say that no question of notice of the acceptance of a guaranty, or proposal to guaranty, is involved in this case.

Applying these principles to the case under consideration, our first conclusion is, that the contract of the appellant, expressed in the form set out in the complaint, was an agreement that his principal Telford would perform the covenants contained in the lease, and was not the direct engagement of the appellant to do anything personally except to answer for his principal's default, and it was, therefore, collateral to that of the principal, and one of strict guaranty; and, within the rule laid down, it was the duty of the guarantee to have given notice of the default.

It does not follow, however, that because of a failure to give notice, the guarantor was thereby discharged from liability. A failure to give notice, and damage resulting therefrom, must both concur in order that the guarantor may be discharged. This is believed to be the result of the doctrine of the best considered cases in this court, as it certainly is of the adjudications of other courts.

In the case of *Davis v. Wells*, 104 U. S. 159, cited approv-

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ingly in *Wills v. Ross*, 77 Ind. 1, this rule was recognized and followed. *Vinal v. Richardson*, 13 Allen, 521; *Bashford v. Shaw*, 4 Ohio St. 263; *Second Nat'l Bank v. Gaylord*, 34 Iowa, 246; *Brandt Suretyship and Guar.*, section 173.

The fact that notice is required of the guarantee does not make the giving of notice a condition precedent to his right to maintain an action against the guarantor, for the reason that his liability may or may not exist without notice. The notice is not, as in the case of commercial paper, necessary to give the right of action, although the failure to give it may defeat it.

It results from the foregoing considerations that the complaint was not bad for failing to aver notice of the default.

Other grounds of objection are urged by counsel against the complaint, which have received careful attention, but our conclusion is that while they are not without force they could only be made available by answer.

Assuming, without conceding or denying, the necessity of the presence of the appellees to accept the surrender of possession at the end of Telford's term, as urged by appellant, it was only available by answering that fact and coupling it with such other facts as would show injury to him, or that Telford's lease was thereby extended by implication of law, and so, if by the subsequent conduct of the appellees in prosecuting suits against Telford, or by accepting payment of damages, the relations of the parties were changed in any way, to the appellant's detriment, all these were matters, like the failure to give notice, as we conceive, to be set up in defence.

The judgment is affirmed, with costs.

Filed Jan. 21, 1885.

Secrist v. The Board of Commissioners of Delaware County.

No. 11,876.

100	59
144	110
100	59
162	66

SECRIST v. THE BOARD OF COMMISSIONERS OF DELAWARE COUNTY.

MECHANIC'S LIEN.—*Material Man.*—*Public Building.*—*County.*—*Contractor's Bond.*—*Remedy by Action on.*—Under sections 5293 and 5295, R. S. 1881, relating to the enforcement of mechanics' liens, there could be no lien upon a county building on account of materials furnished therefor to the contractor, and likewise no personal liability on the part of the county in favor of such material man. In such case, the remedy is by action on the contractor's bond as provided for by sections 4246 and 4247, R. S. 1881.

From the Delaware Circuit Court.

J. R. McMahan, for appellant.

J. W. Ryan and *W. Brotherton*, for appellee.

BICKNELL, C. C.—On the 11th of December, 1883, the appellant filed with the county board of Delaware county, her claim against said county, alleging that Meyers & Son were the contractors for building a jail for the county, and that the claimant, between the 1st days of April and October, 1882, had supplied said contractors with stone used in the construction of said jail; that there was a large sum of money due and unpaid thereon; that in May, 1883, the claimant notified said county board in writing, that she intended to hold the county liable to her for the payment of said sum of money; that when said notice was given, the county had in hand \$6,000, which was due said Meyers & Son for work on said jail. The claimant demanded an allowance for the sum of \$2,810.95 and six per cent. interest from October 1st, 1882, and \$200 as attorney's fees.

The county board refused to allow the claim; the claimant appealed to the Delaware Circuit Court; there the defendant moved to dismiss the claim, because the claim did not state facts sufficient, and because the county board had no jurisdiction to determine the matters in said claim set forth. This

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motion was sustained, and the claim was dismissed at the claimant's costs. She appealed to this court.

The error assigned is that the circuit court sustained the motion to dismiss the claim.

The law in force at the time when these materials were furnished was section 5295, R. S. 1881, which provided that "Any sub-contractor, journeyman, or laborer employed in the construction, repair, or furnishing materials for any building, may give to the owner thereof, or, if such owner be absent, to his agent in charge of said building or repairs, notice in writing, particularly setting forth the amount of his claim and services rendered for which his employer is indebted to him, and that he holds the owner responsible for the same. The owner shall be liable for such claim, but not to exceed the amount which may be due, and may thereafter become due, from him to the employer; which may be recovered in an action whenever an amount equal to such claim over other claims having priority shall be due from such owner to the employer."

Section 5295, *supra*, provides for the personal liability of an owner to a material man. It was section 649 of article 36 of the code of 1852, as amended by the act of March 11th, 1867. 2 R. S. 1876, p. 267. The caption of said article 36 was, "To enforce mechanics' liens on buildings." It was held in *Board, etc., v. O'Conner*, 86 Ind. 531 (44 Am. R. 338), that the mechanics' lien law of this State contains no provision to the effect that such a lien may be acquired or enforced upon or against public property held for public use, and that, in the absence of such a provision, no such lien can be enforced against such property.

The case just cited was an action commenced in the circuit court, claiming such a lien against such public property, and it was held, for the reason above stated, that a demurrer to the complaint for want of facts sufficient was properly sustained.

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So, in the case of *Lowe v. Board, etc.*, 94 Ind. 553, this court said: "Laws creating liens in favor of mechanics do not operate on the public property of municipal corporations. * * * The statutes giving liens to mechanics, and the statutes creating judgment liens, are broad and comprehensive and free from exceptions, and yet it has never been supposed that these statutes operate upon the public property of counties or cities."

Although section 5295, *supra*, does not provide for a lien, yet it undertakes to establish a personal liability of the owner to the party who, under section 5293, R. S. 1881, might have a lien.

We think it was the intention of the Legislature in these sections to create a personal liability in favor of those only to whom a lien was given, and that as there can be no lien upon a county building for materials furnished, so, also, there can be no personal liability established against a county in favor of a party who has furnished materials to a contractor for a public building of the county. The phrase "personal liability," used in said section 5295, is not applicable to such municipal corporations as a county, and it would be contrary to public policy that a county should be involved in controversies and litigation between contractors and material men and laborers. A remedy for the party who has furnished such materials to a contractor for a county building, is found in sections 4246 and 4247, R. S. 1881, as follows:

"4246. No bid for the building or repairing any courthouse, jail, poor asylum, bridge, fence, or other county building shall be received or entertained by the board of commissioners of any county in this State, unless such bid shall be accompanied by a good and sufficient bond, payable to the State of Indiana, signed by at least two resident freehold sureties; which bond shall guarantee the faithful performance and execution of the work so bid for, in case the same is awarded to said bidder, and that the contractor, so receiving said con-

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tract, shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished, and for boarding the laborers thereon.

"4247. Any laborer and material man, or person furnishing board to said contractor, as in the preceding section provided, and having a claim against such contractor therefor, shall have the right of action against such contractor and his bondsmen therefor: *Provided*, Such person shall have first demanded payment of the same from such contractor."

In *Wallace v. Lawyer*, 54 Ind. 501 (23 Am. R. 661), it was held that a county can not be made a co-defendant in a proceeding supplementary to execution against a debtor, to answer as to its indebtedness to the execution debtor. And it is also held that a municipal corporation is not liable to the process of garnishment. The reason given for these rulings is, that it would be contrary to public policy to permit such public corporations to be involved in such litigations, or to permit their public duties to be embarrassed in order that individuals might more readily collect their private debts. *City of Chicago v. Hasley*, 25 Ill. 595; *Merwin v. City of Chicago*, 45 Ill. 133. These were decisions in relation to cities, but the principle asserted therein has been held by this court to be equally applicable to counties. *Wallace v. Lawyer, supra*.

We think it would be contrary to public policy to enforce against the county the claim presented in this suit, and that, therefore, said claim was properly dismissed by the circuit court for want of facts sufficient, etc.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 30, 1885.

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No. 10,002.

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BUCHANAN.

ATTORNEY AND CLIENT.—*Attorney's Fees.—Contract.—Principal and Agent.*—

Where it is provided in a contract between an agent and his principal, that said agent as attorney, in making collection of loans made by him upon real estate as agent for such principal, should be entitled to receive as compensation in case of suit "any sum that may be collected as attorney's fees as provided in the bond or instrument upon which suit may be brought," he is entitled to the amount of fees actually collected in such suit. If the whole amount, as specified in the instrument and reduced to judgment, is realized, he is entitled to it; if, however, the property is sold on execution to a third person for a less amount than the judgment, or bid in by his principal for a less amount than the judgment, but yet at the actual value of the property, he should receive a sum out of the amount realized, or the actual value, as the case may be, in proportion to his interest in the judgment.

SAME.—*Power to Compromise Claims.—Damages.*—An attorney has no general power to compromise claims of the client; but where there is not time or opportunity for consultation with the client, he may, in the exercise of a reasonable discretion, negotiate a compromise where the circumstances are such that he must act without delay, and where the interests of his client will be seriously imperilled unless he so act, and if he act in good faith, with fair skill and vigilant care, he is not liable for damages.

SAME.—*Collections.—Retaining Fees from.*—Where an attorney collects money for a client, he has a right to apply such money upon fees due him for making such collection, and, also, upon any other fees that may be due him from such client for professional services.

SAME.—*Fees, Action for.*—Where a client collects fees belonging to an attorney, the latter may maintain an action for them as for money had and received.

SAME.—*Implied Contract.*—The fact that an attorney is employed as an agent to negotiate loans does not preclude him from rendering professional services, if requested by his principal, and if so rendered he is entitled to recover the reasonable value thereof upon the implied contract.

PRINCIPAL AND AGENT.—*Loan Agent.—Evidence.—Recitals in Written Instrument.*—Recitals in reports of appraisers, chosen by an agent appointed to negotiate loans, to place a value on property upon which loans are asked, constitute no evidence of the truth of the facts stated, but may be considered in determining whether the agent acted in good faith.

SAME.—*Non-Resident Principal.—Agent's Liability.—Fraud.—Negligence.*—Where such an agent sends to his non-resident principal such informa-

100	68
127	180
100	68
187	477
188	304
189	522
100	68
140	305
100	68
149	406
151	257
100	68
154	80
156	298
100	68
160	474
100	68
164	161
100	68
165	387
100	68
167	527

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tion regarding the security offered as he has obtained, he is not liable for losses unless he is guilty of fraud or of negligence in not obtaining more.

SAME.—Evidence.—Reasons for Writing Letter.—Witness.—A witness can not be permitted to state the reasons which influenced him to write a letter, not ambiguous in meaning, in which he gave explicit directions to his agent to do a designated act, as such agent may act upon the letter, and the reasons existing in the mind of the writer can not, unless known to the agent, affect his rights.

SAME.—Implied Contract.—Money Had and Received.—In an action by an agent against his principal on an implied contract to account to him for money had and received, and to pay the reasonable value of the agent's services, the plaintiff may prove how much of his time was devoted to the business of such principal.

SAME.—Measure of Compensation.—Where a rate of compensation for services is fixed by contract, that rate governs; but where there is no contract fixing the rate, the reasonable value of such services is the measure of compensation to be recovered.

SAME.—Custom.—Jury.—Where there is a customary value fixed for services, that rate controls; but where there is no such customary rate, the jury must ascertain their value from the evidence placed before them.

ACTION, DELAY IN BRINGING.—May be Explained.—Statute of Limitations.—Within the period prescribed by the statute of limitations, or where there is no such statute, delay in bringing an action at law may be explained, and the fact that such delay is explained may be deduced by inference from the facts developed by the whole evidence.

EVIDENCE.—Court Not to Determine Probative Force.—Instructions.—It is not for the court, in ruling upon evidence, or in framing instructions, to determine the probative force of evidence. If it is material, relevant and competent, it is for the jury, and instructions bearing upon it, without respect to its weight or credibility, can not be deemed irrelevant.

INSTRUCTIONS.—How Considered.—Instructions are not to be considered in separate and detached parcels, but must be taken as a whole, and if, when so considered, they express the law without material contradiction, there is no error.

SAME.—Evidence to Which Applicable.—Where there is evidence to which an instruction is applicable, it is immaterial by whom or for what purpose it was introduced.

SAME.—Repetition of.—Where a proposition of law is once fully and clearly stated to the jury, it need not, and ought not to, be repeated in subsequent instructions.

SAME.—Inferences.—Province of Jury.—It is not proper for the court to instruct the jury as to mere inferences of fact which it is their duty to make from the evidence.

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SAME.—For instructions generally, embracing the principles governing this case, see opinion.

HARMLESS ERROR.—A judgment will not be reversed for a harmless error.

From the Marion Superior Court.

S. Claypool and W. A. Ketcham, for appellant.

S. M. Shepard, C. Martindale, J. Buchanan and G. B. Manlove, for appellee.

ELLIOTT, J.—The appellee became the agent and attorney of the appellant in August, 1872, and in the bond executed to secure the faithful discharge of the duties of the agency is the following:

“Whereas the said Jas. Buchanan has been duly appointed by the Union Mutual Life Insurance Company of Maine as their financial and loan agent for the State of Indiana, and is intrusted and charged with the investment of any and all money intrusted to him for investment upon first mortgages upon real estate worth at least twice the amount loaned thereon, said investment only to be made by him after the proposed application and security have been approved by said company, and the proposed borrower's bond duly executed and delivered to him, and the mortgage securing same has been duly executed and deposited for record, then he is to draw his draft upon said company for the amount of the proposed loan, less the cash portion of any premium for life insurance that may be payable out of such loan. The said borrower of any sum is to pay all expenses of loan obtained. The said agent is to collect and remit any and all money due of loans made by him, whether of principal or interest, free of charge to said company, except in case of suit; the said agent as attorney for said company shall be entitled to receive as compensation in such suit any sum that may be collected as attorney's fees as provided in such bond or instrument upon which suit may be brought. The compensation for services of said agent shall be for such sums as may be agreed upon between him and the borrowers, as a commission for negotiating the loans,

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and the said company shall not be liable to said agent for any compensation for services except as above provided in case of suit for collection."

For a series of years Buchanan acted under this contract, and now claims compensation for legal services rendered the appellant, and for attorney's fees received by it in cases where the money due upon loans was collected by suit.

There are more than twenty-five hundred pages of evidence, and we shall make no general synopsis, but shall refer to that part of the evidence involved in the argument of counsel as we take up the questions in the order in which they are presented.

It is proper to preface our discussion of the instructions by stating the rule, so often repeated in our decisions, that instructions are not to be considered in separate and detached parcels, but must be taken as a whole, and if, when so considered, they express the law without material contradiction, there is no error. Counsel for appellant, by detaching the instructions assailed from the group in which they properly belong, pursue a course which is not borne out by reason or authority, for no writings, literary, law, or any other, can be justly judged by piecemeal.

The court in its third instruction entered upon the work of construing the contract between the parties, and stated that there were three general classes of services provided for in that instrument. The first class, the jury were informed, embraced "all services necessary, or properly incident to the investment of any and all money entrusted to the plaintiff, and would include the preparation and examination of papers and records, the procuring of insurance, and the performance of other like acts." The fourth instruction directed the jury that for such services the plaintiff must look to the borrower alone for compensation. The fifth instruction defines, and correctly, the second class of services provided for by the contract to be services rendered in making collections without suit. The third class of services are defined by the fifth instruction to be services rendered in the collection of claims by

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suit, and the seventh describes very clearly and correctly states what such services are.

In the sixth instruction the court stated the second question to be "the amount and mode of payment specified in the bond for such services," and it is to this question that the eighth instruction (to be presently noticed) refers. No objection is made to any of the instructions we have mentioned, but a reference to them is necessary in order to justly understand the force of the eighth, ninth, tenth and eleventh, to which objections are urged, for these instructions form a group covering one branch of the case. The instructions here assailed read thus:

"8. I will now endeavor to answer the second inquiry, what is the amount and mode of payment specified in bond for services of making collections by suit? The amount is whatever may be collected as attorney's fees in such suit, which of course can not exceed the amount specified in the judgment, which amount is fixed by the bond or other instrument securing the loan sought to be collected by such suit. There can be little or no difficulty when the full amount of the attorney's fees provided for in the judgment was in fact collected in money by sale or otherwise. That is what the plaintiff was entitled to. If he got that, then he was entitled to no more. If the defendant collected it, and failed to pay it over to him, then the defendant was bound to compensate him therefor.

"9. If a judgment was taken in such suit, but it has never been satisfied by sale, or otherwise, then the plaintiff is not entitled to recover the attorney's fees specified in such judgment, for by the bond he is entitled only to such sum 'as may be collected as attorney's fees.'

"10. Suppose, however, that in a suit for collection upon a loan made by plaintiff, prosecuted by him in behalf of defendant, he recovered a judgment for \$1,050, including, say \$50 attorney's fees, suppose that he procured a sale of the land mortgaged to secure such loan, to satisfy such judgment, and that upon such sale only \$500 was bid, and nothing more

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was ever realized upon said judgment, what would the plaintiff be entitled to out of the amount realized? I answer that he and the defendant would each be entitled to receive out of the fund realized in proportion to their interest in the judgment itself, that is, in the case supposed, the plaintiff would be entitled to one $\frac{1}{21}$ parts, or \$23.81, and the defendant to twenty $\frac{1}{21}$, or \$476.19.

"11. Suppose, again, that after taking judgment, as in the case last supposed, for \$1,050, including \$50 attorney's fees, the plaintiff procured a sale of the mortgaged land, but nobody bid anything, and in order to sell or get anything out of the judgment, it was bid in by defendants at \$500, this being all that it was worth, and nothing further ever being realized upon such judgment, what would be the compensation to which plaintiff would be entitled in such case? I answer, that it would be just the same as in the former case, that is, he would be entitled to a sum out of the actual value of the land in proportion to his interest in the judgment, which would be, in this case, as in the other, \$23.81, and this the plaintiff would become liable for to the plaintiff as soon as the land was bid off."

These instructions not only state the law correctly upon the subject they cover, but they present it with such perspicuity and precision as to entitle them to high commendation.

The general rule is that fees earned by an attorney who conducts the suit belong to him, and not to his client. We need not stop to inquire whether it would, or would not, be against public policy for an attorney and client to agree that the latter should take the fees, or part of them, for here the contract between the attorney and client secures the fees to the attorney. If the fees did belong to the attorney, and were in fact received by the client, there can be no doubt that the former might have his action, as for money had and received, if the latter refused to account for the fees collected.

It is said by counsel that "the words 'collected in money by sale or otherwise,' contained in the eighth instruction,

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might, perhaps, standing alone, be construed to mean an actual collection in money, but there was no evidence tending to make such a case." We are satisfied that even if it were proper—as it certainly is not—to isolate this phrase from its associate words, the jury could not have been misled, and if this be true, as it is, then there was nothing more than a harmless error, and for harmless errors judgments are never reversed.

Where, as here, fees to which the attorney is entitled are received by the client, the attorney may maintain an action for them. It can make no difference whether the client takes pay in money or property, for, if he does receive the full value of the fees, he has neither a legal, moral nor equitable right to deprive the attorney of them. The clause assailed does, therefore, assert an abstract proposition in correct terms, and we are not willing to say that there was no evidence to which it was applicable, for the record by no means excludes such a hypothesis.

The counsel object to a similar clause in the ninth instruction, and affirm that it must have controlled the decision of the jury. If it did so far control the jury as to carry them to the conclusion that the appellee was entitled to recover for fees received by the appellant either in money or in property, it produced a just result. We can not say that there was no evidence that the property which the appellant in some instances acquired did not pay both its debt and the attorney's fees. But, if we are wrong in this, still no harm resulted to the appellant, because the tenth and eleventh instructions declare, with unusual clearness, that where the fees were received by the appellant in part, and not in full, the appellee's right of recovery was limited to the amount actually received. It is not possible to presume, without doing great violence to the language of the trial court, that the jury understood the court to direct them that the appellee was entitled to recover whether the appellant had, in fact, received the attorney's fees in whole or in part. The ninth instruction, in very forcible

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language, says that the appellee "is entitled only to such sum as may be collected as attorney's fees."

The court was unquestionably right in directing the jury that the appellee was entitled to recover the proportion that the fee bore to the whole amount realized. Both the client and the attorney had an interest in the judgment recovered, and the former could not grasp all the avails of the sale on the final process, and exclude the latter from participation in the proceeds. The services of the attorney were valuable to the client, and he was entitled to recover at the specified rate of compensation upon the amount realized by the client. The example put by the court was just and apposite, and properly explained the law to the jury.

The tenth and eleventh instructions do not exclude the evidence of the value of the land from the jury. The reverse of this is true. These instructions clearly direct the jury that where the full amount of the attorney's fees was not yielded by the land bought in on the judgments, the attorney could recover no more than the proportion the fees bore to the whole amount, reckoned according to the specified rate of compensation, and upon the sum actually realized by the client.

We do not think the eleventh instruction will bear any such construction as that which counsel endeavor to place upon it. We do think that it informs the jury in plain terms, that if the land in the case supposed was bid in at \$500, and this was all it was worth, the appellee could only recover attorney's fees for the collection of that sum, no matter what was the amount of the judgment. We do find evidence upon the subject of the value of the land acquired on the judgments, and, therefore, find evidence to which the instruction is applicable. We suppose it to be perfectly clear that if there is evidence upon the subject, it is utterly immaterial by whom, or for what purpose, it was introduced.

The thirteenth instruction is not faulty. It is a familiar rule of law, that where a rate of compensation is fixed by con-

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tract, it will govern so far as to furnish the measure for computing the compensation to be awarded the party entitled to a recovery. It is also undoubted law, that where services are performed at the request of a defendant, and there is no contract fixing their value, the plaintiff is entitled to recover their reasonable value. It is likewise true, that where there is a customary value fixed for such services, that rate controls; but where there is no such customary rate, the jury must ascertain their value from the evidence placed before them.

The nineteenth instruction given by the court reads thus:

"19. But the fact that the plaintiff may have suffered a long period of time to elapse without making demand or bringing suit for the alleged items of indebtedness for which he sued, is susceptible of various explanations consistent with the hypothesis of the justness of his claim, and it is for you to say whether or not the plaintiff has offered one that is satisfactory or not."

If we were to detach this instruction from the group in which it is found, and consider it apart from those with which it is associated, we could not condemn it, for it accurately asserts an abstract proposition of law, and is correct as far as it professes to go. It is true that delays in prosecuting actions may always be explained except where the delay is beyond the period prescribed by the statute of limitations. Where there is no statute, there may always be an explanation. The court, in asserting that the delay was susceptible of explanation, neither expresses nor implies that there was an explanation, but simply says that the delay is one susceptible of explanation, and in express words leaves it to the jury to determine whether or not the plaintiff had offered a satisfactory explanation. If the learned counsel are right, then, when the delay was shown, no evidence of an explanatory character should have been admitted, but the court should at once have closed and bolted the door against its admission, and this conclusion reveals, in its bare statement, its own refutation. A respectable writer says: "At the common law there was no limit

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to the time within which an action might be brought, except in the single instance of a fine, with proclamation." Wood Lim., p. 2, section 2. Dr. Wharton writes: "The presumption, however, is open to be rebutted by proof of the intermediate insolvency of the debtor, or of other grounds for the suspension of the debt." 2 Whart. Ev., section 1320a.

There is, and has always been, a defined and known distinction between actions to enforce a clear legal right and suits to enforce a purely equitable claim. The principles which rule in the latter cases do not prevail in the former. Here the action is to enforce a legal right, and the principles of law rule the case.

Counsel, in endeavoring to prove that the instruction is not pertinent to the case, narrow the effect of the evidence far too much. In civil actions, it is not essential to prove a fact by positive or direct evidence; it is, indeed, not essential that a fact should be so established in prosecutions for crimes of the gravest character, for even there the fact may result from a process of inference. In speaking of this subject Professor Greenleaf says: "In both cases, a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce." 1 Greenl. Ev., section 13a. Our court has often declared that a fact may be inferred from circumstances. *Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143; *Terre Haute, etc., R. R. Co. v. Pierce*, 95 Ind. 496; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; *Indianapolis, etc., R. R. Co. v. Collingwood*, 71 Ind. 476. The fact that the delay in bringing an action is explained may, like any other fact, be deduced by inference from the facts developed by the whole evidence.

There were circumstances disclosed by the evidence in this case making the instruction under immediate mention directly relevant. In the vast volume of testimony before us, there is evidence explaining in great detail the situation, business and conduct of the litigants, and upon the jury devolved the duty of determining whether the delay from 1871 until 1878 was,

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or was not, satisfactorily explained. It is not for the court, in ruling upon evidence, or in framing instructions, to determine the probative force of evidence. If the evidence is material, relevant and competent, it is for the jury, and instructions bearing upon the evidence, without respect to its weight or credibility, can not be deemed irrelevant. *Boots v. Canine*, 94 Ind. 408, see p. 411; *Nave v. Flack*, 91 Ind. 205; *Hall v. Henline*, 9 Ind. 256; *Harbor v. Morgan*, 4 Ind. 158. It is no doubt true that the instructions must be relevant to the evidence, but this does not mean that they shall be only pertinent to the positive evidence, or to the most weighty testimony. The rule is thus stated by Judge Thompson: "But in order to justify him" (the judge) "in giving an instruction predicated upon a supposed state of facts, it is not necessary that he should be entirely satisfied of the existence of such facts; but if there is any evidence from which the jury may infer them to be true, it is his duty to declare the law thereon; and it is not error for him to do so even where the evidence is very slight." *Thomp. Charging the Jury*, section 62.

The nineteenth instruction is, however, grouped with instructions fifteen, sixteen, seventeen and eighteen, prepared by appellant's counsel, and given at their request, and it would be illogical to dislocate it and consider it as if it stood alone. Taking, as it is our duty to do, all these instructions together and treating them as a whole, we have no hesitation in declaring that the law was stated to the jury quite as favorably as the appellant had a right to ask. These instructions of the appellant in themselves refute the proposition that there was no evidence to which the nineteenth was pertinent, for they assume, and justly, that there was such evidence.

The fact that an attorney is employed as an agent to negotiate loans does not preclude him from rendering professional services, if requested by his principal. Loaning money is one thing; giving advice in matters of law, and conducting suits, are quite different things. This is so in every case where there is no stipulation to the contrary, and certainly so here. The

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twenty-first instruction of the court, which reads thus: "21. The mere fact that the defendant employed plaintiff as an agent to loan money, did not of itself require plaintiff to render service as an attorney, without compensation," asserts this proposition in guarded terms, and contains no legal heresy.

It is abundantly settled that courts will presume jurors to be men of average intelligence, and capable of understanding and bearing in mind a proposition of law once fully and clearly stated, without its repetition in subsequent instructions. *Goodwin v. State*, 96 Ind. 550; *Browning v. Hight*, 78 Ind. 257; *McDonel v. State*, 90 Ind. 320, see p. 327.

Thompson says: "In every case, then, where error is assigned on instructions given or refused, the initial point of inquiry is whether the jury were misled. * * * * * The jury are presumed to have understood the charge according to the fair import of its terms when taken together." *Thomp. Charging the Jury*, section 131.

We have again and again decided that if all the instructions taken together express the law correctly, there is no error even if one instruction, standing alone, is incomplete and liable to be misunderstood. *Stout v. State*, 96 Ind. 407; *Goodwin v. State*, *supra*; *McCarty v. Waterman*, 96 Ind. 594; *Lytton v. Baird*, 95 Ind. 349; *Garber v. State*, 94 Ind. 219; *Louisville, etc., R. W. Co. v. Harrigan*, 94 Ind. 245; *Young v. Clegg*, 93 Ind. 371; *Western U. Tel. Co. v. Young*, 93 Ind. 118.

This well known rule overthrows the argument of counsel, that, conceding the instruction to be correct as an abstract proposition of law, still it was erroneous, because it led the jury to believe that Buchanan was entitled to compensation for legal services rendered in negotiating loans. We affirm that by the application of this rule the argument is overthrown, for the reason that in the previous instructions to which we have referred, the court directed the jury, in language strong and clear, that for such services there could be no recovery. We can not conceive it possible that the jury could have been misled.

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It is a familiar rule that the party who asks a reversal must affirmatively show error, and this has certainly not been done by appellant in its attack upon the instructions on the subject of the appellant's delay in enforcing the payment of his claim.

The twenty-seventh instruction, of which counsel complain, was given at their request, and they certainly can not be heard to say that it asserts erroneous propositions of law. Notwithstanding the fact that the record makes it appear that this instruction was given at the request of the appellant, we have examined it, lest we might have misunderstood the recital of the record, or lest some mistake might have crept into it.

Our examination of the twenty-seventh instruction has satisfied us that it correctly states the law. It affirms that the reports of the appraisers chosen by Buchanan to place a value on property upon which loans were asked were not evidence of the statements contained therein, but constituted evidence "tending to show, in connection with other evidence, that Buchanan in making the loans did, or did not, act in good faith in recommending the loans." Recitals in such instruments constitute no evidence of the truth of the facts stated, but may be considered in determining the question whether the agent appointed to negotiate the loans did act in good faith.

The thirty-fourth instruction given by the court is as follows :

"34. In regard to the compromise effected by plaintiff with Schofield, I instruct you as follows: It is the duty of an attorney, when practicable, and as promptly as practicable, to advise his client of all the material facts and legal bearings which may affect his client's interest in a pending litigation, and he should not undertake, without having done so, or without authority from his client, to compromise such litigation, and if he does, he will be held to his client for damages, if any, resulting to him thereby. But if there is such an emergency as requires the attorney to act promptly and before he can advise with his client, and the attorney, acting in good

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faith, with reasonable care and skill, compromises such litigation, he will not be held liable to his client, although it may turn out afterwards that the compromise was not the best that could have been made, or that the client would have fared better without any compromise at all. Applying these legal principles to the present case, it will be for you to say whether the defendant is entitled to anything, and if so, how much, on account of the compromise with Schofield."

There is some conflict among the cases as to the general power of an attorney to bind his client by a compromise, and it is not easy to say which "hath the better reason." The weight of authority is, perhaps, against the power. Pulling Att. 198; Weeks Att. 394; Whart. Agency, section 590. Our decisions have steadily maintained that the attorney has no general power to compromise claims of his client. *Miller v. Edmonston*, 8 Blackf. 291; *Jones v. Ransom*, 3 Ind. 327; *Wakeman v. Jones*, 1 Ind. 517; *McCormick v. Walter A. Wood M. & R. M. Co.*, 72 Ind. 518.

These decisions, however, merely state the general rule and apply it to cases where there was no reason for the attorney's omission to consult with his client, and no excuse for departing from the instructions received by him. In the charge of the court now before us, this general doctrine is fully declared, but it is also affirmed that there may be cases in which the attorney may compromise a pending litigation. If there are no cases in which the attorney can exercise such an authority, then the instruction must be condemned, but if there are such cases, then it should be upheld.

The attorney in charge of pending litigation is bound to give to his client's interest fair learning and skill, vigilant attention and care, and to so conduct it as to secure to his client all he is justly entitled to receive. It is the attorney's duty to guard, in every form, the interests of his client, and if, therefore, an emergency arises which demands that a compromise shall be effected, it is the duty of the attorney to secure the most favorable one that he can obtain. If it be

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granted that there is no instance in which an attorney can effect a compromise for his client, it must be also conceded that the attorney must remain passive, even in cases where by discreet action he might save the sacrifice of the interests of his client. We are satisfied that an attorney may negotiate a compromise where the circumstances are such that he must act without delay, and where the interests of the client will be seriously imperilled unless his action is prompt and decisive. If there is time and opportunity for consultation with the client, then the attorney should not assume authority to compromise his client's claim; but if there is an emergency that prevents consultation, and forces immediate action, it is the duty of the attorney to take such steps as will secure the greatest benefit to his client. The necessity creates the authority, and the position of the attorney demands that the authority be exercised for the client's good. Where there is no emergency, there is no authority, but the authority springs into existence with the emergency. To deny this would be to affirm that there are cases where the attorney must stand idle when action would save his client from loss, and this is incompatible with the general principle that it is the duty of an attorney to do all that can justly be done to promote the interests of his client. Dr. Wharton, in commenting upon this subject, says: "An attorney or counsel, in charge of a case, who does not effect a judicious compromise when open to him, is untrue not only to his client, but to the great cause of public justice of which he is a minister." Whart. Agency, section 590. Upon the same general subject the Supreme Court of Massachusetts said: "It is important to parties that such an authority should be liberally construed; for many exigencies are likely to arise in the progress of a cause, that demand the exercise of discretion when there is no opportunity to consult with a client." *Wieland v. White*, 109 Mass. 392. But we will not prolong this opinion with quotations, for we think that even in those cases which deny the general authority to compromise, the reasoning fully establishes the doctrine of the instructions, for even though

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they deny the general authority to compromise, they still affirm that if there is not an opportunity for consultation, and if there is an exigency, imperatively demanding the exercise of the authority, the attorney may exercise a just and reasonable discretion, and is not liable if he acts in good faith, with fair skill and vigilant care. *Story Agency* (9th ed.), 27, n.; *Whipple v. Whitman*, 13 R. I. 512; S. C., 43 Am. R. 42; *Kirk's Appeal*, 87 Pa. St. 243; S. C., 30 Am. R. 357; *Granger v. Batchelder*, 54 Vt. 248; S. C., 41 Am. R. 846; *Holker v. Parker*, 7 Cranch, 452.

We do not, however, understand counsel as assailing the instruction upon the ground that it states the law incorrectly, but upon the ground that it was erroneous as applied to the evidence. We think counsel are in error. It leaves to the jury the question whether there was an emergency justifying immediate action, and it did not divert the minds of the jury from the real controversy. It referred, and only professed to refer, to one particular point, and the jury could not have understood it as referring to any other. It does not limit, by the remotest implication, the jury to the consideration of the points referred to, but it states, and admirably states, a general principle of law applicable to the subject to which it professed to be directed, and to which it was, in fact, addressed.

There were, as we find from a study of the evidence, two theories as to the Schofield compromise mentioned in the instruction, and we can not say that neither was without some support. As there was evidence upon the subject, the court did right in charging the law upon it without assuming to decide upon its weight. It was for the jury to ultimately decide whether the one theory or the other was correct, and to determine whether the evidence was entitled to credit or not. *Nave v. Tucker*, 70 Ind. 15; *Goodwin v. State*, 96 Ind. 550.

It is argued that the evidence shows that the necessity which led to a compromise grew out of Buchanan's inexcusable blunder, and that, therefore, the instruction is erroneous. The fallacy of this argument is apparent. The instruction is addressed to an entirely different theory, and the real question

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is whether it is a correct statement of the law as applied to that theory, not whether it is a correct expression of the law when applied to a different theory. Counsel say of the effect of this instruction: "It was to lead the jury into this line of reasoning: 'Buchanan did not previously consult his client about the compromise because there was an emergency for immediate action. The master in chancery was about to report a finding against Buchanan's client, and something had to be done at once to prevent this, and it was done, and rightfully, because of the emergency.'" This criticism proves the correctness of the instruction, and thus defeats the purpose of its author. If there was an emergency so pressing as that arising from the adverse decision of the master, there was no opportunity for consultation with the client residing in a foreign State, and it was the duty of the attorney to act. If it was the duty of the attorney to act, then it was proper for the court to so inform the jury, and to lead their minds into a proper train of reasoning. It is a merit, not a fault, to lead the minds of the jury into a proper line of ratiocination.

The thirty-fifth instruction of the court reads thus:

"35. In regard to the Masten land, I instruct you, that it is the duty of the attorney as soon as he reasonably can, after *collecting money for his client*, to report the fact to such client, to keep such collections unmixed with his own money, and, within a reasonable time after such collection, to remit the amount collected, less his fees, to his client, unless he receives instructions to the contrary. *He has a right, however*, to apply such collection, not only upon the fees due him for making the same, but also upon whatever fees may then be due him for professional services from such client; and, therefore, he is not bound to remit anything, if such client is indebted to him for fees due him for such professional services, an amount greater than the amount of such collection."

The abstract propositions of law stated in this instruction are correct; an attorney has a right to retain his fees out of moneys collected for his client. The instruction does not as-

sume that the money from the Masten land came into the hands of Buchanan, nor does it profess to cover the whole of the Masten affair; it simply states that when fees are due the attorney, and he collects money for his client, he may retain his fees out of it, and does not, directly or indirectly, intimate any other doctrine; nor does it profess to cover or apply to any other phase of the case than that of the right of the attorney to retain his fees. One instruction need not, and manifestly can not, cover every phase of a complicated case.

The court refused to give the seventh instruction asked by the appellant, and we think properly, for it was nothing more than the repetition of a rule fully stated in instructions numbered thirty-eight, thirty-nine, forty and forty-one, given at the request of the appellant. It is not the duty of the court to repeat legal rules in various forms; it is sufficient if the rule is once fully and clearly stated. It would not, perhaps, be available error to often repeat, but it would certainly be a censurable practice, for it would tend to confuse the jury, and might give undue emphasis and prominence to a particular fact, and this it is not well to do. *Goodwin v. State, supra*; *Thomp. Charging the Jury*, p. 101.

The ninth and tenth instructions asked by the appellant, and refused by the court, read as follows:

"9. If there is anything in the correspondence which has been introduced before you which may seem to corroborate any of the testimony of James Buchanan, you should not treat it as a corroboration of his testimony, if, under all the evidence, you are satisfied that he has studied that correspondence and so shaped his testimony as that the correspondence might seem to corroborate his testimony.

"10. A letter of April 25th, 1877, written by Mr. Sharpe, vice-president, to James Buchanan, is in evidence before you. In that letter Mr. Sharpe recites what he says was the agreement concluded between him and Buchanan in regard to fees, in February, 1877, and concludes with a statement from Mr. Sharpe, 'that he will call upon Mr. Buchanan in a few weeks

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on his way west.' This letter was introduced by James Buchanan, and in connection with the letter it is claimed that he, Buchanan, testified that within a few weeks after receiving said letter he did see Mr. Sharpe in Indianapolis, and told him (Sharpe) that he (Sharpe) had misstated in said letter the agreement between them, and Mr. Sharpe had assented that he had misstated the agreement between them. Now, if you find that Mr. Buchanan did, in connection with such letters so testify, and he purposely stated that he saw and talked with Mr. Sharpe at said time, when in fact he did not, but made the statement that he did because he supposed that the conclusion of said letter would corroborate the statement in part, and that such statement was made solely because he thought the letter would in part furnish a corroboration, and that in this particular he purposely so shaped his evidence as to seem to be corroborated by the letter, you have a right to presume he has done the same thing in regard to other correspondence wherein it may seem to corroborate him."

These instructions were properly refused. It is not proper for the court to instruct the jury as to mere inferences of fact which it is their duty to make from the evidence. Instructions should state legal principles, not declare inferences of fact. They may be declarations of law, but not commentaries upon evidence. The law is for the court; the facts are for the jury. Inferences from proved facts must be made by the triors of the issues of fact. The instructions under immediate mention do not contain a single proposition of law; they simply embody the result of counsel's deductions from what they assume the evidence establishes. In an argument to the jury they have a proper place, but in the instructions of the court they are out of place. If courts were to undertake to direct the jury as to particular inferences of facts, the charge would be an argument upon the facts and not an exposition of the law. Our decisions agree that it is not proper for the court to instruct the jury upon mere inferences of fact, except

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in rare cases, where settled rules of law declare definite results to flow from known facts. The deductions embodied in these instructions affect the credibility of witnesses, and like kindred matter are fair subjects for comment in addresses to the jury. Thompson says: "It is, therefore, merely a repetition of what has already been said, to say that it is for the jury, and not for the judge, to draw presumptions of fact; and that, for the judge to tell the jury what presumption of fact they ought to draw from a given fact or series of facts, is a usurpation of their functions." In commenting approvingly upon the case of *Bond v. Warren*, 8 Jones, 191, this author said: "It was for the jury, and not for the judge, to draw inferences or presumptions of fact from the evidence." Thomp. Charging the Jury, p. 64.

In the case of *Woollen v. Whitacre*, 91 Ind. 502, it was said: "The decisions of this court are numerous to the effect that it is error for the court to say or intimate to the jury that any circumstance or fact should be considered by them to the disparagement of a witness's testimony." The court, in another case, in speaking of matters such as those mentioned in appellant's instructions, said: "These are matters about which the law lays down no general or inexorable rule. They constitute facts for the consideration of the jury in every case in which such questions may arise." *Millner v. Eglin*, 64 Ind. 197. But it is unnecessary to make further quotations, and we leave the question without doing more than directing attention to the following cases: *Newman v. Hazelrigg*, 96 Ind. 73; *Finch v. Bergins*, 89 Ind. 360; *Works v. Stevens*, 76 Ind. 181; *Davis v. Hardy*, 76 Ind. 272; *Garfield v. State*, 74 Ind. 60; *Voss v. Prier*, 71 Ind. 128; *Evansville, etc., R. R. Co. v. Wolf*, 59 Ind. 89; *Pratt v. State*, 56 Ind. 179; *Veatch v. State*, 56 Ind. 584; *Nelson v. Vorce*, 55 Ind. 455; *Greer v. State*, 53 Ind. 420.

There was no error in refusing the fourteenth instruction asked by the appellant. It asserts that an agent is responsible for losses resulting from loans negotiated by him for a

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non-resident principal in cases where the agent sends to the principal the appraisements upon which the loans were made, unless he, the agent, has advised him of the sources of his knowledge, and such loans have been accepted by the principal with full knowledge of the sources of the agent's information. Where the agent sends to his non-resident principal the appraisements, he does impart information of the facts upon which he acts, and the instruction is faulty for the reason that it does not give due importance to the act of the agent in placing the appraisements before the principal.

An agent is not responsible for an error in judgment in transacting the business of his principal, but he is responsible if he conducts the business negligently, or fails to bring to it proper skill and knowledge, or acts in bad faith. Whart. Agency, sections 272, 273, 274. An agent is not responsible unless he has been guilty of some misconduct, and it can not be asserted, as a matter of law, that an agent who places in the hands of his principal the appraisements of property upon which loans are sought is guilty of misconduct, from the bare fact that he does not add to this information a statement of his own judgment, or does not also give further information. If he had concealed additional information that he actually possessed, the case would be essentially different. Where, however, he sends what he has, and is not shown to be guilty of negligence in not obtaining more, he is not liable, unless, indeed, he was guilty of fraud. A principal who receives such information as this instruction assumes that the appellant did receive, ought, in good conscience, to call for more if he is not content with it.

There was no error in refusing to permit the appellee to dismiss part of his complaint, for it is well settled that a plaintiff may dismiss as to part or all of his cause of action before the jury retire. *Cohn v. Rumely*, 74 Ind. 120; *Burns v. Reigelsberger*, 70 Ind. 522; *Carter v. Spencer*, 4 Ind. 78.

A witness can not be permitted to state the reasons which

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influenced him to write a letter, not ambiguous in meaning, in which he gave explicit directions to his agent to do a designated act. A party to whom a letter is addressed, containing explicit directions, may act upon the letter, and the reasons existing in the mind of the writer can not, unless known to the recipient of the letter, affect the rights of the latter. There was, therefore, no error in refusing to permit the appellant's vice-president and acting executive officer to testify as to the reasons which induced him to write to Buchanan directing him to make collections of interest.

We perceive no harmful error in the ruling permitting Buchanan to testify as to the statements of the appellant's officers concerning the amount of the money they would furnish him to loan in the State of Indiana, for, conceding, but by no means deciding, that the evidence was incompetent, still the instructions so clearly directed the jury as to the basis upon which a recovery could be had, and the evidence so fully shows that nothing was allowed upon this evidence, that it is plain that no harm was done the appellant.

It was not improper to permit the appellee to prove how much of his time was devoted to the business of the appellant, for this evidence tended, in some degree, at least, to show the value of his services. The written contract does not provide the rate of compensation for all services, and does not, therefore, cover the entire claim which the evidence tended to make out in favor of the appellee.

The right of the appellee to recover does not depend upon the written contract; that does not fix his compensation for all services performed for the appellant, but does provide that he shall receive his compensation for making loans from the borrowers, and that in cases where collections are made by suit he shall be entitled to the attorney's fees provided in the bond of the borrower. When, therefore, the appellant collected the attorney's fees, it became liable to the appellee for money had and received, and when it requested him to perform legal services, and he did perform them, he became en-

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titled to recover the reasonable value of such services upon the implied contract. It is perfectly clear, therefore, that the written contract was not the foundation of the action. The counsel are, therefore, clearly in error in asserting that the right of action rests entirely on the written contract, for the cause of action rests on the implied contract to account for the money had and received for the appellee's benefit, and upon the implied contract to pay him the reasonable value of his services. It results that it can not be held that there was a failure of proof, or that evidence tending to prove facts from which the law would raise the implied contract was incompetent.

We have given this case full and careful consideration, notwithstanding the fact that counsel for the appellee have pointed out many omissions and imperfections in the record. We have departed from the long established rule in doing this, but the peculiar circumstances of the case, and the great complication and length of the record, seemed to at least excuse, if it does not justify, this course. In considering the point that the verdict is not supported by the evidence, we have not regarded, as in strictness we should have done, the imperfect state of the record, but have treated the record as full and perfect, and have found in it evidence on all material points sustaining the verdict, so that we can do no otherwise than refuse to disturb the finding of the jury.

Judgment affirmed.

Filed Jan. 20, 1885. Petition for a rehearing overruled March 31, 1885.

No. 11,869.

FORD v. GRIFFIN.

PLEADING.—*Argumentativeness.*—Argumentativeness is not a cause of demurrer under the code.

SUPREME COURT.—*Practice.*—*Motion to Strike Out.*—Where a part of a pleading has been stricken out on motion, the Supreme Court will not review the ruling unless the motion to strike out is in the record.

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BILL OF EXCEPTIONS.—*Must be Presented to Judge within Time Given.*—Where time was given to file a bill of exceptions, and the bill was not presented to the judge within the time, the bill is no part of the record. R. S. 1881, section 629.

From the Posey Circuit Court.

E. D. Owen, for appellant.

A. P. Hovey and *G. V. Menzies*, for appellee.

BICKNELL, C. C.—This was a suit by the appellant against the appellee to recover damages for the unlawful taking and conversion of personal property.

The defendant answered in two paragraphs, to wit:

1. The general denial.

2. That James Rachels mortgaged to plaintiff the property in controversy, being at the time largely indebted to other creditors not provided for by the mortgage, and that the plaintiff and said Rachels fraudulently conspired together "to place in said mortgage an excess of property," for the purpose of cheating and delaying said creditors, with the agreement and understanding that Ford should hold the mortgaged property in trust for said Rachels, and upon foreclosure of the mortgage should buy in the property for said Rachels; that in pursuance of such fraudulent conspiracy, said Ford foreclosed the mortgage, and at the foreclosure sale bought in the property for said Rachels, who afterwards, during his lifetime, remained in possession of it, claiming it as his own, and exercising acts of ownership over it, with the knowledge and consent of the plaintiff; that the defendant was the administrator of said Rachels, and found the property at the former residence of the deceased, and took possession of it as administrator and sold it with the other property of the deceased, and distributed the proceeds under the order of the Posey Circuit Court, "there being no heirs on record against the property," and defendant having no knowledge but that said property belonged to his said decedent.

A demurrer by the plaintiff to said second paragraph of

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answer was overruled. The plaintiff replied to said second paragraph of answer as follows, to wit:

1. That the creditors of said Rachels' estate are all paid in full; that there was enough of said estate, without the property in controversy, to pay said creditors in full; that the sum secured by the mortgage mentioned in said second paragraph of answer was a *bona fide* debt, and that said defendant, before he sold said property, had notice of the plaintiff's claim.

2. A general denial.

The defendant moved to strike out all that part of the first paragraph of the reply which alleges that said Rachels' creditors were paid in full, and that the assets of said estate were sufficient, without the property in controversy, to pay said creditors in full. This motion was sustained, and the plaintiff excepted. The issues were tried by the court who found for the defendant.

The plaintiff's motion for a new trial was overruled, judgment was rendered for the defendant on the 3d day of September, 1883, and on the same day sixty days' time was given to the plaintiff in which to file a bill of exceptions.

The plaintiff appealed. The errors assigned are:

1. Overruling the appellant's demurrer to the second paragraph of defendant's answer.

2. Sustaining the defendant's motion to strike out part of appellant's reply.

3. Overruling appellant's motion for a new trial.

The second paragraph of the answer was merely an argumentative denial of the conversion alleged in the complaint. The substance of it is that there was no conversion of the goods of the plaintiff; every material fact alleged in the answer could have been given in evidence under the general denial; therefore it might have been stricken out on motion (*Gerard v. Jones*, 78 Ind. 378), and it would have been a harmless error to sustain the demurrer to it. *Proctor v. Cole*, 66 Ind. 576. And, under the code, argumentativeness not being one of the causes of demurrer, there was no error in

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overruling the demurrer. Argumentativeness at common law was bad only on special demurrer, and there is no special demurrer under the code. *Main v. Ginthert*, 92 Ind. 180; *Graham v. Martin*, 64 Ind. 567.

The second specification of error presents no question, because the motion to strike out part of the reply is not made part of the record by bill of exceptions. *Flora v. Cline*, 89 Ind. 208; *Scotten v. Randolph*, 96 Ind. 581.

As to the third specification of error, all the reasons for a new trial relate to the sufficiency of the evidence and to the rulings of the court in admitting and rejecting evidence. On September 3d, 1883, sixty days' time was given in which to file the bill of exceptions.

There is a bill of exceptions in the transcript which purports to contain the evidence, and the record shows it was filed on the 9th day of November 1883. The sixty days expired on the 2d day of November, 1883. The certificate of the judge shows that this bill was presented to and signed by him on the 8th day of November, 1883, six days after the expiration of the sixty days. The bill of exceptions not having been either filed or presented to the judge within the time allowed, it does not bring the evidence into the record, and the third specification of error is unavailable. R. S. 1881, section 629.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 22, 1885.

No. 11,665.

HINKLE ET AL. v. SHELLEY.

ASSIGNMENT OF ERROR.—*Practice*.—A joint assignment of error, in the Supreme Court, by two or more appellants, can not be sustained, unless it is well assigned by all.

100	88
126	387
126	378
100	88
137	234
100	88
143	437

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From the Clinton Circuit Court.

A. E. Paige and *S. O. Bayless*, for appellants.

L. C. Burke, *W. A. Staley* and *J. V. Kent*, for appellee.

Howk, J.—This was a civil suit by the appellee, Shelley, to recover damages for an assault and battery alleged to have been committed upon him by the appellants, Hinkle, Herron, Barnett, Timerman and Graham. All the appellants except Graham jointly answered by a general denial of the complaint. The issues thus joined were tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of \$300. Judgment was rendered on the verdict against all the appellants except Graham, and, their motion for a new trial having been overruled, they have appealed to this court.

All the appellants, Graham included, have jointly assigned a single error upon the overruling of the motion for a new trial. It is manifest from our statement of this case that the appellant Graham has nothing to complain of in this court. The record fails to show that he was ever served with process in this cause, or that he appeared therein in the court below, either in person or by attorney. No judgment was rendered against him below, and the record discloses no ground whatever for his joinder in this appeal. As we have already said, he has joined with his co-appellants in the assignment of error. In this court the assignment of error is the complaint of the appellants, and, like a complaint in a trial court, it must be good as to all who join therein, or it will be good as to none. It has often been held by this court, that a joint assignment of error by two or more appellants can not be sustained, unless it is well assigned by all. *Eichbrecht v. Angerman*, 80 Ind. 208; *Towell v. Holweg*, 81 Ind. 154; *Feeney v. Mazelin*, 87 Ind. 226; *Williams v. Riley*, 88 Ind. 290; *Boyd v. Pfeifer*, 95 Ind. 599; *Robbins v. Magee*, 96 Ind. 174.

It may be said that this rule of practice is technical, and

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we admit that it is; but sometimes, as in this case, a technical rule enables us to affirm a judgment which ought not, in our opinion, to be reversed. In the hurry of trial, errors may be committed in the admission or exclusion of evidence, which, if considered, might lead to the reversal of the judgment, even where, as in this case, it appears to us from the entire record that substantial justice has been done. Where, as here, the record shows that five men seized upon one man, blindfolded him, hurried him to the woods, tied him to a tree and whipped him, merely because his habits and conduct were not in accord with their views of propriety, and they are assessed therefor the moderate damages adjudged against them in this case, we may be excused, we trust, for availing ourselves of the technical, but well settled, rule of practice above stated, in order to affirm such judgment. The error assigned is not well assigned by the appellant Graham, and, being a joint assignment, it can not be sustained as to the other appellants. The questions discussed by counsel, therefore, are not properly presented for our decision.

The judgment is affirmed, with costs.

Filed Jan. 27, 1885.

No. 11,820.

BYNUM v. THE BOARD OF COMMISSIONERS OF GREENE COUNTY.

SHERIFF.—*Compensation for Keeping Jail and Caring for Prisoners.—Cases Limited.*—A sheriff, in this State, for services rendered by him in keeping the county jail and taking care of the prisoners confined therein, is entitled to no compensation in addition to the amount allowed by law for the boarding of prisoners. *Board, etc., v. Reissner*, 58 Ind. 280, and *Board, etc., v. Reissner*, 66 Ind. 568, limited.

From the Greene Circuit Court.

S. O. Pickens, S. W. Axtell and W. W. Moffett, for appellant.

A. G. Cavins, E. H. C. Cavins and W. L. Cavins, for appellee.

300 90
180 163

100 90
1169 301

Bynum v. The Board of Commissioners of Greene County.

ELLIOTT, J.—The appellant claims compensation for services rendered by him in keeping the jail of Greene county and taking care of the prisoners confined in it during the time he held the office of sheriff. It is admitted by the complaint that the county has paid the sum of sixty cents per day, allowed by law, for the boarding of each prisoner, so that the question is whether the sheriff can secure pay for his services, in addition to the amount allowed by law for the boarding of prisoners? We have no hesitation in declaring that he has no right to the additional compensation.

The policy of the legislation of the State has been to deny to public officers constructive fees and salaries, and it has been repeatedly held that a public officer can not successfully assert a claim to fees unless there is a statute conferring it in express terms or by fair implication. *Wright v. Board, etc.*, 98 Ind. 88; *Donaldson v. Board, etc.*, 92 Ind. 80; *Nowles v. Board, etc.*, 86 Ind. 179. There is no statute giving a sheriff compensation for services rendered in keeping the county jail or looking after the prisoners committed to his charge; on the contrary, the clear implication is that the compensation fixed for boarding prisoners is intended to cover the services rendered by the sheriff in maintaining the jail of which he is made the keeper.

A sheriff takes the office with all its burdens, and subject to the power of the Legislature to add new duties, and he can recover no other compensation than such as the law provides. *Falkenburgh v. Jones*, 5 Ind. 296; *Turpen v. Board, etc.*, 7 Ind. 172; *Board, etc., v. Blake*, 21 Ind. 32; *Board, etc., v. Templer*, 34 Ind. 322.

The duty of the sheriff is to keep the jail, and this duty has always been recognized as a general one. A general duty such as that can not be deemed special services, entitling the sheriff to special compensation. Extra compensation for giving personal attention and time to the general duties of his office might be claimed with quite as much reason and propriety as for keeping the jail.

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Our conclusion in this case is not in conflict with the decisions in *Board, etc., v. Reissner*, 58 Ind. 260, and *Board, etc., v. Reissner*, 66 Ind. 568. What is decided in those cases is, that for fuel, articles of property bought for the county, and necessary for use in the jail, the sheriff is entitled to an allowance. To this result those cases lead, and to that they must be limited. Possibly they must be deemed to be even more limited by the effect of subsequent legislation. All that the officer can claim, under existing laws, is, that when he buys property for the county, for use in the jail, he is entitled to be reimbursed. Nor is it all kinds of property for which he can claim an allowance; on the contrary, he can not successfully claim an allowance for things necessarily used and consumed in boarding prisoners, for these things are to be deemed to be included in and paid by the *per diem* allowed for boarding prisoners. Where, however, the property is furniture, or articles of that character, then, unless some different legal provision has been made for its purchase, the sheriff may be reimbursed for money expended in purchasing it.

Judgment affirmed.

Filed Jan. 29, 1885. Petition for a rehearing overruled April 1, 1885.

No. 10,959.

THE PENN MUTUAL LIFE INSURANCE COMPANY v. WILER.

LIFE INSURANCE.—*Application.*—*Pleading.*—*Complaint.*—*Exhibit.*—The application for a policy of life insurance need not be filed with the complaint in an action on the policy.

SAME.—*Disease.*—*Answer.*—*Demurrer.*—Where an answer to a complaint on a policy of life insurance avers that the insured answered "No" to the question in the application, "Has any near relative been afflicted with or died of consumption," etc., whereas he had had near relatives who were afflicted with and had died of such disease, but does not name them or state the degree of relationship, it is insufficient on demurrer, as stating a conclusion of law.

SAME.—*Contract of Insurance, How Construed.*—*Interrogatory to Applicant.*—*Ambiguity.*—A contract of life insurance should be liberally construed.

100	92
137	22

100	92
163	382
163	384

100	92
165	560

100	92
171	689

The Penn Mutual Life Insurance Company v. Wiler.

with a view to effectuate its purpose, and, if there be any ambiguity in an interrogatory propounded to the applicant, or if it be capable of more than one answer, it should be construed most strongly against the insurer, and most favorably to the insured, in whose favor all doubt should be resolved.

SAME.—Partial Answer.—Warranty.—General Provisions of Application.—If the answer given by the applicant to an interrogatory be in itself true, and there is no intentional suppression or omission or fraud on his part, though the question be such as to suggest a fuller and more detailed answer, yet, if the insurer be content with the partial answer, he can not claim a warranty extending beyond such partial answer; nor can general provisions following the questions and answers in the application make this otherwise.

SAME.—Evidence.—Physician.—Privileged Communication.—Waiver.—Beneficiary.—Under section 497, R. S. 1881, relating to privileged communications, a physician can not, in an action by the beneficiary on the policy, when objection is made by the plaintiff, testify as to his professional attendance on the insured before the date of his application for insurance; this privilege, however, creates no absolute incompetency, and it may be claimed or waived by the beneficiary, but the production in evidence, by such beneficiary, of facts learned in a professional capacity by one physician, is not a waiver of the right to object to the divulging of other confidential communications by other physicians.

SAME.—Declarations of Insured.—Res Gestæ.—Hearsay.—Breach of Warranty.—The declarations of the insured, made some time previous to his application for insurance, and not shown to have been parts of the *res gestæ* of any acts or facts indicating a diseased condition of the insured, which the declarations tend to explain, can not prove or tend to prove the fact of his ill health, but constitute mere hearsay, and, as such, are not admissible against the beneficiary, to show a breach of warranty.

SAME.—Burden of Proof.—Where the defendant, in such case, pleads in answer that the insured made an untrue answer to a certain question contained in the application, the burden is on him to establish such fact.

From the Allen Superior Court.

R. S. Taylor, for appellant.

W. H. Coombs, R. C. Bell, S. G. Morris and J. F. McHugh, for appellee.

BLACK, C.—This was an action brought upon a policy of insurance on the life of Solomon Wiler, wherein the appellant promised and agreed to and with said assured, his executors,

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administrators and assigns, to pay the sum insured to his wife, the appellee, her executors, administrators or assigns within sixty days after due notice and proof of his death.

There was an answer of eight paragraphs, the first being a general denial. Demurrers to the fourth, sixth, seventh and eighth paragraphs were sustained.

The plaintiff replied, and a trial by jury resulted in a verdict for the plaintiff, on which judgment was rendered, a motion for a new trial having been overruled.

The appellant in argument here has objected to the complaint, on the ground that the policy made the application therefor a part of the contract, and that, therefore, the application should have been set out with the complaint. We will not take space to fully state or to discuss the question suggested by the appellee as to whether the assignment of errors presents for decision the question involved in this objection to the complaint, but we dispose of the subject by saying that it may now be regarded as an established rule in this State that in such a case the application, or a copy thereof, need not be filed with the complaint. *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310.

In each paragraph of the answer except the first, it was alleged, in substance, that prior to the execution of the policy said Solomon Wiler executed to the defendant an application in writing and print signed by him, of which a copy was made an exhibit; that the policy was issued in pursuance of, and was based upon, said application; that it was expressly stipulated and provided in the policy and in the application, that the latter should and did constitute part of the contract of insurance, and that all the statements and declarations thereof should be regarded as warranties and material, and that if the same should be in any respect untrue, the policy should be null and void. Each of said special paragraphs alleged that the statements and declarations contained in said application were false and untrue in certain respects stated.

The provision of the policy thus referred to by the answers

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was as follows: "And it is also understood and agreed to be the true intent and meaning hereof, that if the application for insurance made to the said company by said Solomon Wiler, and bearing date the 1st day of November, 1879, a true copy whereof is placed on the back of this policy, and upon faith in the truth and accuracy whereof this agreement is made, which application is hereby made part of this contract, and the statements and declarations of which are to be mutually regarded as warranties and material, shall be found in any respect untrue, then, and in such case, this policy shall be null and void."

Following the questions and answers in said application were certain provisions whereby it was covenanted and agreed "that this declaration, and the above mentioned answers and proposal contained in the foregoing application, whether written by his own hand or not, every person whose name is hereto subscribed adopts as his own and warrants to be full, complete and true, and to be the only statements given to the company in reply to its inquiries which shall be the basis of the contract between the undersigned and" said company. And it was further covenanted and agreed, "that if there has been any suppression or omission of any fact by the party making this application, or if any untrue or fraudulent allegation be contained herein or in the foregoing answers and proposal, all moneys which shall have been paid on account of such insurance shall be forfeited to the said company, and the policy of insurance made on the faith of this declaration and of the above answers and proposal shall become null and void and of no effect."

The second and third paragraphs of answer alleged the making of untrue statements by the assured in said application, in answer to certain questions as to whether he had suffered from or been subject to divers physical ailments.

In the fifth paragraph, it was shown, among other things, that in said application, in answer to the question: "How many full brothers has the party had?" the assured an-

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swered, "eight;" and that under the word "living," in a column immediately after said question, he had answered "six." And it was alleged that, in truth, he had not had eight full brothers, six of whom were living.

In the fourth paragraph of answer, it was alleged, by way of showing an untrue statement in the application, "that in answer to question No. 13 of said application, which is as follows: 'Has any near relative been afflicted with or died of consumption, cancer, disease of the heart, or any scrofulous disease, apoplexy, insanity, gout or disease of the kidneys?' the said Solomon Wiler answered, 'No;,' whereas, in fact, the said Solomon Wiler had near relatives who were afflicted with and died of consumption before the signing and making of said application for insurance."

It is agreed by counsel for both parties, that the demurrer to this paragraph was sustained for the reason that the pleading did not name the near relatives alleged to have been afflicted with and to have died of consumption, or state the degree of their relationship to the life insured.

We think the court below based its ruling upon a sufficient reason. Whether any particular person was a near relative within the meaning of the contract, was a question of law, and the pleading stated a conclusion of law.

Among the interrogatories and answers in the application were the following: Questions. "18. A. How long since he was attended by a physician or professionally consulted one? B. For what disease? C. Give the name and residence of the physician who attended him. D. Give the name and residence of his usual medical adviser or family physician, to whom he refers for a certificate." Answers. "A. About one year ago. B. Bad cold. C. Dr. Isaac Rosenthal, Fort Wayne, Ind. D. Dr. Isaac Rosenthal, Fort Wayne, Ind."

The sixth, seventh and eighth paragraphs of the answer related to these interrogatories and answers. The sixth paragraph, after the inducement above stated, common to all the special paragraphs, set out said questions and answers, and al-

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leged that the insured had been attended by and had professionally consulted Dr. George T. Bruebach, a practising physician, on the 22d day of May, 1879, and on other subsequent days, for diseases other and more serious than a bad cold, to wit, for bronchial asthma and bronchial catarrh, all which consultations and attendance were within less than six months before the making of said application, which was on the 1st of November, 1879.

The seventh paragraph was like the sixth, except that it mentioned as the physicians whom the insured had professionally consulted, and by whom he had been attended, Dr. Isaac Rosenthal and three others named, and stated that the diseases for which they had treated him were asthma, bronchitis, consumption and other diseases.

The eighth paragraph, besides said inducement and said extract from the application, alleged that it was specially covenanted and agreed by said Solomon Wiler in said application, and as part of said contract of insurance, that he would and did warrant all the answers in said application contained to be full, complete and true, and that if there had been any suppression or omission of any fact in said answers, then said policy of insurance should be void and of no effect.

The provisions of the application thus referred to were the general provisions set out therein after the questions and answers.

The eighth paragraph contained averments like those of the seventh, and further alleged, that while it was true that said Dr. Isaac Rosenthal, about a year before the making of said application, attended the applicant for a bad cold, yet he, by his said answers, suppressed and omitted to state the more important and material facts that he had professionally consulted and been attended by said Dr. Isaac Rosenthal and said other physicians, for fever, asthma, bronchitis and consumption, so that said answer was not full and complete, without omission or suppression, as it was consented, agreed and

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warranted it should be by the terms of policy and said application. "Wherefore the defendant says that by reason of said breach of covenants and warranty in said policy and application contained, the said policy of insurance has become and is wholly null and void."

We think that there was no error in sustaining the demurrers to these answers. It is not shown that any of the statements made by the applicant were in themselves untrue.

The contract of insurance should be liberally construed, with a view to effectuate its purpose. The language of the policy, and of the interrogatories and provisions of the application, is carefully and deliberately prearranged by the insurer; in its preparation the insured has no part. Whatever there may be in the language so prepared by the insurer, which has any tendency to defeat the main purpose of the contract, should be strictly construed against the insurer. If there be any ambiguity in an interrogatory propounded to the applicant, or it be capable of more than one answer, it should be construed most strongly against the insurer, and most favorably to the insured, in whose favor all doubt should be resolved.

If the answer given to any interrogatory be in itself true, though the question be such as to suggest a fuller and more detailed answer, yet, if the insurer be content with the partial answer, he can not claim a warranty extending beyond the partial answer. Warranties in insurance policies are always strictly construed.

If the answer to any of the many questions propounded to the applicant was in itself untrue, there was a breach of warranty. If all the answers were true, there was no breach of warranty, and the general provision following the questions and answers in the application could not make this otherwise. We think it would not be understood by the applicant from those general provisions, that if all his answers were true, and honestly made, the policy should be void for an unintentional omission of some fact without which

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some answer was not full. If the answers were true in themselves, and there was no intentional suppression or omission, no fraud on his part, his answers should not be held to avoid the policy. It was not alleged in any of the paragraphs of answer that there was an intentional omission or suppression, or that any answer in the application was fraudulently incomplete. See *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *John Hancock Mutual Life Ins. Co. v. Daly*, 65 Ind. 6; May Ins., section 200.

On the trial, the defendant introduced certain physicians as witnesses, and offered to prove by them that at various times, before the date of the application for insurance, when they had professionally attended the insured, he was suffering from asthma and other diseases. Upon objections made by the plaintiff, such evidence was excluded. The objections were made and sustained on the ground that the facts which it was thus sought to prove were within the provision of the statute in relation to matter communicated to physicians by their patients. Our statute upon this subject has undergone some changes at various times. The form in which it existed at the time of the trial of this cause is found in section 497, R. S. 1881, as follows: "The following persons shall not be competent witnesses: * * * Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases." It does not devolve upon us in this connection, we scarcely need to say, to adopt or reject or to formulate a rule of evidence. A statute which the Legislature had authority to enact is the rule, and it only belongs to us to interpret it in particular cases. As to the wisdom of the rule of the common law protecting confidence between attorney and client, there has been general agreement among judges. Mr. Appleton, in his *Rules of Evidence*, in advocating its abolishment as a needed reform, found it "difficult to perceive, wherein consists the difference between the confidence which exists be-

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tween physician and patient," and "that subsisting between the client and attorney, and why different rules should obtain in the last from those adopted in the former cases." Appleton Ev., p. 163.

While the modern statutory changes in this and other States upon the subject of witnesses have not included the abolishment of the protection of confidences between attorney and client, which in this State are expressly protected by statute, they have extended what was evidently intended to be a like protection to confidences between physician and patient.

Under our statute, when by its terms it provided that physicians were not competent witnesses "as to matters confided to them in the course of their profession, * * * unless with the consent of the party making such confidential communication," it was held by this court, in agreement with authorities elsewhere, that the evidence which might be excluded was not only such as related to what the patient told the medical witness, whether under injunction of secrecy or otherwise, but also such as related to what the physician learned by observation or by examination of the patient, without regard to the character of the supposed ailment. *Masonic Mutual Benefit Ass'n v. Beck*, 77 Ind. 203.

The same construction should be given to the statute in its present form. It is plain, that without such a construction the statute would be of but little practical efficacy for the purpose intended in its enactment. That the present statute should be so construed is, in effect, held in *Excelsior Mutual Aid Ass'n, etc., v. Riddle*, 91 Ind. 84.

The purpose of the statute is not the suppression of truth needed for reaching correct results in litigation, though this may sometimes incidentally occur (as it may also in other instances of exclusion on the ground of wise policy), but the purpose is the promotion and protection of confidence of a certain kind, the inviolability of which is deemed of more importance than the results sought through compulsory disclosure in a court of justice. Notwithstanding the abso-

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lutely prohibitory form of our present statute, we think it confers a privilege which the patient, for whose benefit the provision is made, may claim or waive. It gives no right to the physician to refuse to testify, and creates no absolute incompetency. To hold otherwise would result in many cases in obstructing justice without subserving the purpose of the statute. In this opinion, we are in agreement with the view taken by other courts of enactments upon this subject in form absolutely prohibitory. *Johnson v. Johnson*, 14 Wend. 637; *Grand Rapids, etc., R. R. Co. v. Martin*, 41 Mich. 667; *Scripps v. Foster*, 41 Mich. 742; *Allen v. Public Adm'r*, 1 Bradf. 221; *People v. Stout*, 3 Parker Cr. 670. And in a case like the one at bar, *Excelsior Mutual Aid Ass'n v. Riddle, supra*, in considering the exclusion of testimony of an attending physician, upon objection based upon the ground that it was privileged, this court approved the rejection of the testimony, and said that, so far as the question under consideration was concerned, there was no substantial difference between the statute of 1881 and the former law under which *Masonic Mutual Benefit Ass'n v. Beck, supra*, was decided. As in the case of attorney and client, the inviolability of the confidence, the right of objecting to the disclosure of matter communicated to a physician as such by his patient, does not cease with the death of the latter. This view is reasonable, and it is supported by the decided cases. We do not deem it necessary or proper for us to attempt in this opinion to indicate what should be the effect of this statute in other supposable cases which may come up to this court, and, in view of previous decisions here, we have been induced to say thus much upon the subject only because of the earnest argument of the learned counsel for the appellant. See, however, *Allen v. Public Adm'r, supra*; *Staunton v. Parker*, 19 Hun, 55; *Pierson v. People*, 79 N. Y. 424; *Fraser v. Jennison*, 42 Mich. 206, 224. Not without the careful consideration asked by counsel, we are constrained to interpret the statute as giving to a person, having such a rela-

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tion to the deceased patient and a contract made by him as that sustained by the appellee, the right in a suit by her on the contract, either to waive the statute or to object on the ground thereof. It may be said that in such case she represents the patient for such purpose. The statute is remedial and should be liberally construed with a constant view to its purpose. Confining our decision to the case before us, we are satisfied that a proper application of the statute was made in *Masonic Mutual Benefit Ass'n v. Beck*, *supra*, and *Excelsior Mutual Aid Ass'n v. Riddle*, *supra*. Besides the citations in the former case, see *Gartside v. Connecticut Mutual Life Ins. Co.*, 16 Cent. L. J. 253.

The plaintiff, by way of rebuttal, introduced as a witness the physician who, on behalf of the defendant as medical examiner, had examined the insured for this insurance, and elicited testimony from him tending to prove that the insured was in good health at the time of the application. Afterwards the defendant recalled the physicians before introduced by the defendant, and again sought from them the evidence which had been excluded as above stated. Upon objection, their testimony was again excluded. This offer was made upon the theory that the plaintiff, by having herself introduced the testimony of one physician, had waived her right to object to the testimony of other physicians. This theory is not well founded. If the plaintiff's examination of said medical examiner as a witness could be regarded as a waiver of a privilege, the consent of the patient, or of one entitled to stand as his representative, to the production in evidence of facts learned in a professional capacity by one physician, could not be construed as consent to the divulging of other confidential communications to other physicians.

The court, upon the plaintiff's objection, excluded offered testimony of one Carney and of one Craw, witnesses for the defendant, the offered evidence having relation to declarations of the insured. The testimony of Carney was contained in his deposition. He deposed that at some time, not definitely

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stated, but which was more than two years and a half before the application, the insured used the words, "This damned asthma." This witness testified that he did not know of whom the insured was speaking.

The witness Craw had testified that he was in the employment of the insured from about the 1st of February, 1877, until the 15th of December, 1878. The defendant offered to prove by him, "that Mr. Wiler, on different occasions, during the time named during which the witness was in his employ, and before this application was made to the company for a policy of insurance, stated to the witness that he had the asthma, and suffered from it."

It was not shown, and it was not proposed to show, in either instance, on what occasion or under what circumstances the words were used, and no accompanying fact was shown or offered in evidence.

The policy, during the life of the insured, after its execution, as well as after his death, was a chose in action owned by the plaintiff as her separate property. Without her joining, her husband could not assign it. *Pence v. Makepeace*, 65 Ind. 345; *Godfrey v. Wilson*, 70 Ind. 50.

The declarations of the insured, uttered at such long intervals before the making of the application, and not shown to have been parts of the *res gestæ* of any acts or facts indicating a diseased condition of the insured which the declarations tended to explain, could not prove, or tend to prove, the fact of his ill health, but constituted mere hearsay, and as such were not admissible against the plaintiff to show a breach of warranty. *Swift v. Mass. Mutual Life Ins. Co.*, 63 N. Y. 186; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Dilleber v. Home Life Ins. Co.*, *supra*; *Fraternal Mutual Life Ins. Co. v. Applegate*, 7 Ohio St. 292; *Hurd v. Masonic Mutual Benefit Society*, 6 Ins. L. J. 792; *Mobile Life Ins. Co. v. Morris*, 3 Lea, 101; *May Ins.*, section 214; *Bliss L. Ins.*, section 371, *et seq.*

Amongst the questions and answers in the application were

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those mentioned above as being shown in the fifth paragraph of answer.

It is insisted that the verdict was contrary to the evidence, especially, that the evidence proved that the applicant had had only seven full brothers.

The attention of the court and that of the jury were given particularly to this question. The court instructed the jury that if it appeared upon the application that the applicant stated therein that he had had eight full brothers, and if the jury believed from the evidence that he had had, in fact, only seven full brothers, it would be their duty to find for the defendant. The attention of the jury was further directed to this matter by an interrogatory, in answer to which they found specially that, at the making of the application, the applicant had had eight full brothers. The court's attention was again called to the matter by the motion for a new trial, assigning as one of the causes the insufficiency of the evidence. The burden of proof as to this question was upon the appellant.

It is manifest, that to justify this court in setting aside the conclusion thus reached in the trial court, the evidence should be such as to establish the appellant's impeachment of the truth of the applicant's answer in question, without any contradiction or any uncertainty whatever.

As the evidence appears upon the record, considered in all its parts, it seems to us that the jury might well have found from it that the applicant had had only seven full brothers. But the jury were to proceed upon the assumption that the applicant told the truth, until the contrary was proved to their satisfaction. It was for the jury to consider the appearance and manner of the witnesses, and to determine the trustworthiness of their memories. Two witnesses, a brother and a sister of the applicant, testified upon this question. Their testimony upon paper shows that they were somewhat confused in their memories, and the testimony of neither was in all respects consistent in itself.

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As requested by counsel for the appellant, the evidence upon this question has been examined by all of us, and, after careful consideration, it has been determined that we ought not to interfere with the conclusion reached in the trial court.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellant.

Filed Jan. 28, 1885.

No 6416.

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PROMISSORY NOTE.—*Principal and Surety.*—*Oral Contemporaneous Agreement between Payee and Surety.*—*Consideration.*—Where it is orally agreed between the payee of a promissory note—made in the usual form, due in six months, and payable without any condition expressed—and one of the makers who signed as surety, contemporaneously with the [making of the note, that in consideration that such surety would secure a debt then owing by F., the other maker, to the payee, a wholesale merchant, the latter would extend to F. such “further credit for goods as would enable him to carry on his business,” and would credit on the note all sums of money which F. should thereafter pay him until the note was fully paid, such agreement can not be pleaded or proved to discharge the surety from liability on such note, first, because it is too uncertain, and can not be enforced, and, second, because it is in contradiction of the terms of the note.

SAME.—*Pleading.*—*Payment.*—*Demurrer.*—In such case, a paragraph of answer setting out the above facts, and further averring that after the note was executed, and prior to its maturity and before suit thereon, F., “under and by virtue of said contract and agreement,” paid to the payee, at different times, sums of money equal to the amount of said note, by which it was fully paid, is good on demurrer as a plea of payment.

SAME.—*General Scope and Tenor of Pleading.*—*Failure of Consideration.*—Where the general scope and tenor of another paragraph of answer in such case is to set up, as a plea of failure of consideration, the agreement between the surety and the payee, and the refusal of the payee to perform it, such paragraph can not be held good as a plea of payment, even if the facts alleged would be otherwise sufficient for such purpose.

SAME.—*Application of Payments.*—If money be paid by the principal maker to the payee from time to time, after the note has matured, with directions to apply it on the note, it is his duty so to apply it, and if he fails or refuses the law will make the application, irrespective of the agreement between the payee and surety.

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PLEADING.—*Premature Bringing of Action.—Complaint.—Demurrer.*—Where a complaint does not show upon its face, or by proper exhibits attached, that the action has been prematurely brought, it is not bad on demurrer for that reason.

From the Allen Circuit Court.

J. Morris, W. G. Colerick, H. Colerick and T. W. Colerick, for appellant.

R. S. Robertson, R. S. Taylor and J. B. Harper, for appellees.

MITCHELL, J.—The decision to be made in this case involves the validity of an oral agreement made contemporaneously with the execution of a note, between the payee and one of the makers, who signed as surety.

This note is declared on as the foundation of the action, and from a copy, which is set out in the complaint, it appears to be the joint note of the appellees Fletcher and Lillie, and is drawn in the usual form, for \$3,299.55, due in six months, without interest, payable without any condition expressed.

Lillie answered separately in two paragraphs. The first paragraph presents, in substance, this state of facts: That at the time of the execution of the note, Fletcher was engaged in business as a merchant, and had prior thereto become indebted to Trentman, who was a wholesale merchant in the city of Fort Wayne, in the amount mentioned in the note. Fletcher desiring further credit from Trentman, which he was not willing to extend without having the indebtedness already accrued secured, it was agreed between Lillie and Trentman, that if he would secure the debt then owing by Fletcher to him, he would extend to Fletcher such further credit for goods as would enable him to carry on his business, and that he would credit on the note which Fletcher and Lillie were to give all sums of money which Fletcher should thereafter pay him until the note was fully paid, and that this agreement formed the whole consideration upon which Lillie signed the note.

The answer further avers that after the note was executed, and before it fell due, and before the bringing of suit thereon, Fletcher, "under and by virtue of said contract and agree-

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ment," paid to Trentman at different times divers sums of money, in all amounting to \$3,380, by which payments it is averred the note was fully paid.

In the second paragraph, Lillie alleges substantially the same agreement with Trentman as the consideration upon which he signed the note, to which is added the following averments:

"That in consideration of said agreement this defendant agreed to sign said note as surety for said Fletcher; that thereupon said plaintiff prepared a pass-book for the use of said Fletcher, and entered a memorandum of said agreement therein as follows: 'August 27th—Note for \$3,299.55, signed C. C. Fletcher and James Lillie. All money Cr. here to be applied on this note;' that under said memorandum and accompanying and contemporaneous agreement, plaintiff made divers entries at divers times of moneys so paid by said Fletcher, amounting to the sum of \$1,220.80, and on or about the 23d of September, 1874, the plaintiff refused to enter thereon any further credits of payments made by said Fletcher, against the wish and demand of the defendants, and each of them, that he should make such entries of credits for moneys paid; that thereafter, at divers times, said Fletcher made divers payments to plaintiff under said agreement, amounting, in addition to the above named sum of \$1,220.80, to the sum of \$2,160, in all to the sum of \$3,380.80, which should, under said agreement, have been applied in payment of said note; that all of said payments were made before said note became due, and before said suit was brought, whereby said note became fully paid and satisfied. Wherefore," etc.

Separate demurrers were filed and overruled to each of these answers, and it is now contended by the appellants that the ruling of the court in holding the answers good was error.

That the consideration upon which a surety or guarantor signed a note may be different from that moving between the payee and the principal debtor, can not be doubted. Whether this consideration can be averred and proved when it is not evidenced by a contemporaneous writing, so executed as to be-

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come part of it, must depend upon the nature of the agreement upon which it rests.

If to prove the consideration upon which the surety signed the note would involve the proving of an agreement which would contradict or vary any of its terms, then its proof would fall within the inhibition of the well settled rule which forbids the contradiction or variance of a note or other written instrument by parol. This rule applies as well to the surety as to the principal.

If, however, the consideration grows out of a valid agreement between the payee or obligee of a note or contract and the surety thereon, which is collateral to and not in contradiction of its terms, then the rule is that it may be set up and proved. In the case of *Tucker v. Talbott*, 15 Ind. 114, a surety who had signed a note for the payment of \$437, due one day after date, sought to show that he signed it in consideration of an agreement made with the payee, that he, the payee, should retain the principal debtor in his service, as a clerk, at a stipulated salary, and that a portion of the salary was to be applied in discharge of the note. It was held that this was a contradiction of the terms of the note, and therefore not allowable, and so it plainly was, for the reason that by the terms of the writing the surety bound himself one day after date to pay a certain sum of money, and to have permitted proof of an agreement that the note might be discharged by the labor of the principal at a different time, would have been in effect to set aside the writing with proof that the surety was not to pay at all. Of like character was the agreement set up by a surety in *Brush v. Raney*, 34 Ind. 416.

In *Campbell v. Gates*, 17 Ind. 126, the surety set up as a defence that he signed the note sued on, upon the consideration that the payee of the note agreed to procure his release from another note which he had signed for his principal to a third person, which agreement, it was averred, the payee had failed to perform, by reason of which the surety claimed that the consideration upon which he signed the note had failed.

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In that case, the answer was held good as showing a failure of consideration, and upon the ground that proof of the consideration upon which the surety signed the note did not conflict with any of its terms. To the same effect see *Port v. Robbins*, 35 Iowa, 208; *Brandt Suretyship and Guar.*, section 352; *Swope v. Forney*, 17 Ind. 385.

Where a surety signs a note, in consideration of an agreement with the payee that the latter should do something in the future, if the agreement is sufficiently certain and of such a character that the surety has a right to rely on its performance, and such agreement is not a contradiction of the note, or some of its terms, we perceive no reason why a failure on the part of the payee to perform should not be held a failure of the consideration as between the payee and surety.

An agreement that Trentman should give Fletcher "further credit for such goods as he, said Fletcher, should need to carry on said business," is too vague, indefinite and uncertain to be the basis of any contract. It is only where a surety can show such a contract, as the consideration upon which he signed a note, as is capable of being enforced or compensated in damages, or as would in itself be a sufficient consideration for a promise or undertaking, he having performed his part, as that the breach of it will avail him as a defence.

The note, which called for the payment of a definite sum of money at a time fixed by Fletcher and Lillie, was, by the terms of this oral agreement, to be paid by Fletcher from time to time "until said note was paid and satisfied." This was a variance of its terms.

After setting out the agreement, the substance of which we have given, the paragraph avers that Fletcher, "under and by virtue of said contract and agreement, * * * paid to said plaintiff, at divers times before said note became due and before this suit was brought, divers sums of money, in all amounting to the sum of \$3,380.00, that being more than the amount due on said note, and by which payments said note became and is fully paid and satisfied." Treating all that is

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said about the agreement upon which Lillie signed the note as surplusage, the first paragraph can be held good as a plea of payment.

It will not be presumed, however, that having pleaded payment in the first paragraph, it was intended that the second paragraph should perform the same office. Indeed, it is plain that it was not so intended, but that the scope and tenor of that answer is to set up the contract between Lillie and Trentman, and the refusal of Trentman to perform it, as a plea of failure of consideration.

The rule laid down by this court is, that the sufficiency of a pleading is to be determined from the general scope and tenor of its averments. It is not competent, even if that was intended by the pleader, to set up the contract by way of confession and avoidance, and at the same time, and in the same paragraph, rely on other matter to make a good plea of payment. The answer must be one thing or the other, and having in the first paragraph averred payment, it could not have been supposed that it was necessary to plead payment in the second. *Kimble v. Christie*, 55 Ind. 140; *Platter v. City of Seymour*, 86 Ind. 323, and cases there cited. Besides, the facts stated fall short of constituting a good plea of payment of the whole note. Applying this rule to the interpretation of the second paragraph of answer, it must be held that the demurrer to it should have been sustained.

The case seems to have been tried upon the theory that the alleged contract between Lillie and Trentman was an important factor in the defence, which, as we have already concluded, was an erroneous assumption. As a matter of course, if money was paid by Fletcher to Trentman from time to time, after the note matured, with directions to apply it on the note, it was his duty so to apply it, and if he received it, and failed or refused to so apply it, the law would make the application, irrespective of the alleged agreement between Trentman and Lillie; and for the reason that under the second paragraph of answer, which we have held insufficient,

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the case seems to have been tried on an erroneous theory, we think it should be reversed so that it may be tried in accordance with the principles here indicated.

As to Fletcher we see no error in the record, and as to him the judgment is affirmed; as to Lillie judgment reversed.

Filed Jan. 20, 1885.

ON PETITION FOR A REHEARING.

MITCHELL, J.—The appellee has presented a petition for rehearing which is supported by an elaborate argument. That the law of the case as applicable to the points decided in the original opinion was correctly announced, is not disputed, but it is insisted that the court overlooked one of the points made in the original brief by counsel, to the effect that the complaint was bad, and that, therefore, the judgment should have been affirmed, on the ground that even if the second paragraph of answer was bad, it was good enough for a bad complaint.

It is said that suit was commenced on the note before it was due, and it is now argued, that as a demurrer was filed to the complaint below and overruled, the court committed an error, and, therefore, this court should have carried the appellee's demurrer to the answer back to the complaint, and affirmed the judgment. The ruling of the court below on the demurrer to the complaint was right.

The record entries show that the complaint was filed in the court below on the 5th day of February, 1875. It does not appear from the record that any summons was issued. On the 15th of February, twelve days before the note fell due, the defendants appeared and submitted to a rule to answer. On the 17th the parties appeared and answers were filed by both defendants, and on the 5th day of March the plaintiff put the case at issue by filing replies. The record shows that the case was then continued. On the 18th day of October, some eight months after the note fell due, the plaintiff filed an amended complaint, with a copy of the note attached,

Trentman v. Fletcher *et al.*

which is the only complaint set out in the record, and in this complaint it is averred that the note is due and remains unpaid. To this amended complaint the appellees filed a demurrer, which was overruled, which is the ruling now complained of as erroneous.

In the consideration of the demurrer the court could look to the complaint and the demurrer, and nothing else, and these papers would not disclose the fact that the suit was commenced before the note fell due.

Upon a demurrer, the court inspects the pleadings before it and passes upon their sufficiency from what appears upon the face of the papers and from proper exhibits attached. A demurrer is allowed only where the defect appears upon the face of the complaint. *Douglass v. Blankenship*, 50 Ind. 160.

An action is commenced when a summons is placed in the hands of the sheriff for service, or when the defendant appears in some way recognized by the law. *Charlestown School Tp. v. Hay*, 74 Ind. 127. But these are questions of fact which can not be determined on a demurrer to the complaint.

In the case of *Hust v. Conn*, 12 Ind. 257, this court said: "Whether the summons was or was not prematurely issued, does not appear in the complaint, and the statutory rule is, that a demurrer reaches such defects only, as appear on the face of the pleading."

If, upon looking at the complaint and the exhibits attached, it had appeared that the cause of action was not then matured, the contention of counsel would be correct. Such is not the case here. When the demurrer was filed in the court below, the cause of action was more than eight months past due, and if the defendants desired to present to the court the fact that the suit was prematurely commenced, it should have been done by answer. Counsel rely on *Seldonridge v. Connable*, 32 Ind. 375. We do not think that case, fairly considered, holds anything contrary to what is here said.

Petition for a rehearing overruled.

Filed March 11, 1885.

Clark v. VanCourt.

No. 11,044.

CLARK v. VANCOURT.

100	113
142	534
100	113
162	528

PRACTICE.—*Bill of Exceptions.*—*Master Commissioner.*—Where exceptions to the report of a master commissioner require, on appeal, an examination of the evidence, it must be set forth in a bill of exceptions, signed by the master.

INFANT.—*Guardian and Ward.*—*Disaffirmance of Contract with Guardian.*—*Ratification.*—*Receipt.*—A ward may, after he becomes of age, disaffirm a contract which he made, while an infant, with his guardian, without restoring, or offering to restore, the property which he purchased and received under the contract; but where, after majority and without fraud or undue influence, such ward executes to his guardian a receipt for the value of the property received by him, such act is a valid ratification of the contract, even if such ward was ignorant of the fact that he had a right to disaffirm. *Felrow v. Wiseman*, 40 Ind. 148, disapproved.

From the Tippecanoe Circuit Court.

E. A. Greenlee and — Parsons, for appellant.

J. A. Stein and G. W. Collins, for appellee.

COLERICK, C.—The appellant, as the guardian of the appellee, presented to the Tippecanoe Circuit Court, at its November term, 1882, his final settlement report, which was, by the court, referred for examination, as to its correctness, to a master commissioner, who was ordered "to report the facts and his conclusions of law thereon" to the court. Afterwards the appellee filed exceptions to the guardian's report, and they were also referred to said master commissioner under a like order. At the February term, 1883, of said court, the master commissioner made his report, in which was embraced a statement of the facts found by him and his conclusions of law thereon. Exceptions were filed by the appellant to the second and fifth specifications of the facts so found by the master commissioner, and to his conclusions of law upon the facts set forth in said fifth specification, which exceptions were overruled by the court, and the following final order was then made and entered: "And the court after

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due consideration of said report" (referring to the report of the master commissioner) "and the exceptions thereto, after argument of counsel, overrules said exceptions, and does in all things approve, ratify and confirm said report, to all of which said guardian excepts; and it is ordered by the court that said guardian do amend his said final settlement report so that the same may conform to the findings, suggestions and conclusions of law of said master commissioner, and so as to show a final balance of \$162.24 in favor of said William VanCourt, to all of which said guardian excepts."

The record shows that time was given to the appellant to prepare and file a bill of exceptions, but none was ever filed. The only errors assigned relate to the overruling of appellant's exceptions to the report of the master commissioner.

The evidence adduced before the master commissioner is not in the record, and hence we can not, in its absence, consider or determine the questions presented by the appellant's first exception to the report of the master commissioner, as their consideration necessarily involves an examination of the evidence. Where, in a case like this, exceptions to a report require, on appeal, an examination of the evidence, it must be set forth in a bill of exceptions, signed by the master commissioner. *Hauser v. Roth*, 37 Ind. 89; *Board, etc., v. Huston*, 12 Ind. 276; *Lee v. State, ex rel.*, 88 Ind. 256; *Cunningham v. Cunningham*, 94 Ind. 557.

The only question properly before us for consideration is, Did the master commissioner err in his conclusions of law, which were adopted by the court, upon the facts found and set forth in the fifth specification of the special finding of facts? Which facts, so found, were as follows:

"Said master finds that voucher No. 5, which purports to have been given for necessities furnished said ward by his guardian, was in fact given for the price of a certain mare sold to said ward by his said guardian during the minority of said ward; that the said ward had no necessary need of a horse; that the said mare was, at the time she was so sold to said ward,

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of the probable value of \$100; that so soon as the guardian knew his said ward had been awarded a pension, which was in the fall of 1881, he procured said ward to execute a receipt in the sum of \$100, purporting to be for 'necessaries,' but in reality being for the price of said mare; that said ward sold said mare to one Charles Stoddard, November 25th, 1881, for \$50 in cash, one old watch (the proof showing it to be worth from \$10 to \$50), and a trunk, probably worth \$6; that said Stoddard afterwards sold said mare for \$116; that four days after said ward came of full age said guardian took his said ward to the office of his said attorney, where a new receipt was executed by said ward, the one now excepted to, and the first one was destroyed; that said guardian knew that said ward could disaffirm the said sale, but the said ward did not, at the time he signed said last receipt, know he could disaffirm said sale; that said ward has not tendered to said guardian either the said \$50, or the said watch, or the said trunk, but still holds in his possession the said watch and the said trunk, and he has claimed his right to disaffirm said sale at the time of filing his said exceptions, but he says to your master that he is now willing to allow his guardian a credit equal to the amount of cash he received, to wit, \$50."

The conclusions of law reached and declared by the master commissioner upon the facts above set forth were: "That said ward can disaffirm, and has elected so to do, the sale of said mare, without the tendering to said guardian of the cash received, or the watch and trunk received, from said Stoddard, which watch and trunk are now in the possession of said ward, and that the execution of the receipt after the said ward became of age, not knowing at the time that he could disaffirm said sale, was not a ratification thereof."

The law, as settled in this State, fully sustains the conclusion that was reached by the master commissioner, as to the privilege or right which the appellee possessed to disaffirm the contract which he made while an infant, without restor-

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ing, or offering to restore, the property which he purchased and received from the appellant under the contract.

A contract made by an infant, although executed, is, as to him voidable—*Fetrow v. Wiseman*, 40 Ind. 148—and it may be avoided by him at any time during his minority, or on his arrival at full age—*Indianapolis Chair M'f'g Co. v. Wilcox*, 59 Ind. 429—without returning, or offering to return, to the other party, the property which was obtained from him under the contract. *Carpenter v. Carpenter*, 45 Ind. 142; *Towell v. Pence*, 47 Ind. 304; *White v. Branch*, 51 Ind. 210; *Dill v. Bowen*, 54 Ind. 204. But we are clearly of the opinion that the master commissioner erred in his conclusion of law, upon the facts found, that the execution of the new receipt by the appellee, after he became of age, was not, for the reason stated, a legal ratification by him of the contract which he made when an infant. There was no fact found showing, or tending to show, that any fraud, undue influence, or unfair means of any kind was resorted to or practiced by the appellant, or any other person, to persuade the appellee to ratify the contract; nor was there any fact found showing, or tending to show, that the ignorance of the appellee as to his legal right to disaffirm the contract, or withhold his ratification thereof, was induced by the appellant, or any other person. And yet, in the absence of such facts, and in the presence of the facts that were found showing that the contract so ratified was founded upon an adequate consideration, and was one that ordinary honesty required the ratification of, the master commissioner held that the appellee was not bound by his act ratifying the same, merely because he did not know that he had the legal right to disaffirm it.

It is true that a conflict exists in the authorities upon this question, and that some of the earlier cases probably sustain the master commissioner in his conclusion, but it is not supported by the more recent and better considered ones. The law on this subject is, in our opinion, correctly stated in Wharton on Contracts, section 57, where it is said: "Sup-

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posing that there be no fraud on the part of the other contracting party, it is not necessary to the validity of an affirmation, that the person making it should be aware of its legal effects. He may have as little knowledge of these effects the day after as he had the day before he comes of age. But the line drawn by the law is necessarily arbitrary; and, as soon as he becomes of age, a knowledge of the legal character of his acts is imputed to him. It is true that there have been intimations that a ratification will not be recognized by the courts unless made with a knowledge of the consequences. If by this is meant that loose talk by a person just coming of age, or concessions induced by misstatements or suppressions of the other side, will not be regarded as ratification, the conclusion may be accepted as true. But to say that a knowledge of the legal consequences of a ratification is necessary to validate a ratification, not only interposes a condition it would be difficult to establish, and which would often be made dependent upon the testimony of the party himself long afterwards when his views may have changed, but would invalidate all ratifications, since there is no ratification all of whose legal consequences can be foreseen. Hence the better opinion is that a ratification, made by a person of sound mind, on arriving at his majority, will be held valid, if untainted with fraud or undue influence, though the party making it was not at the time aware that it bound him in law. If, however, the ignorance of the party ratifying be in any way induced by the other side, then the ratification will not be regarded as operative." See, to same effect, Metc. Con. 59; *Taft v. Sergeant*, 18 Barb. 320; *Ring v. Jamison*, 66 Mo. 424; *Morse v. Wheeler*, 4 Allen, 570; *Stevens v. Lynch*, 12 East, 38; *Anderson v. Soward*, 40 Ohio St. 325. In *Morse v. Wheeler*, *supra*, the cases sustaining the view expressed by the master commissioner in this case were ably reviewed, and shown to rest alone for their support on the mere *obiter dictum* of Lord ALVANLEY in the case of *Harmer v. Killing*, 5 Esp. R. 102.

In all the cases where the doctrine contended for by the

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appellee has found sanction, the contracts in controversy were *executory* and not *executed* ones, and in all the text-books where the doctrine has been referred to, it has been with reference to *executory* contracts only. Although no sufficient reason occurs to us why the doctrine, if correct, should not be applied to *executed* as well as to *executory* contracts, yet we have been unable to find a single case in the reports where it has ever been so applied. The only case which we have been able to discover in the reports of this court, in which such doctrine has been even referred to, is that of *Fetrow v. Wiseman*, 40 Ind. 148. A careful examination of that case will show that the question presented in this case was not involved therein, and hence could not have been, and was not then, decided by this court. All that was said in that case upon the question, now properly before us, by BUSKIRK, J., who prepared the opinion, was *obiter dictum*, and so far as it seemingly conflicts with the views now expressed by us, is disapproved. We have examined the cases of *Conaway v. Shelton*, 3 Ind. 334, and *Conklin v. Ogborn*, 7 Ind. 553, which are cited by BUSKIRK, J., in *Fetrow v. Wiseman*, *supra*, and find that the question involved in this case was not even adverted to in those cases, much less discussed or decided.

It follows, from what we have said, that, in our opinion, the master commissioner erred in his conclusion of law that the contract of the appellee was not, for the reason stated, legally ratified by him, and for the error of the court in overruling the appellant's exception thereto the judgment of the court below ought to be reversed.

It appears in the record that upon the suggestion of the master commissioner, based upon his special finding of the facts and conclusions of law, the court ordered the appellant to amend his final settlement report by striking therefrom the credit of \$100 claimed by him and evidenced by the receipt that had been executed to him by the appellee at the time of the ratification of the contract herein referred to, and, in the language of the master commissioner, "take a credit

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in place thereof of \$50, as herein shown to be authorized by the ward." We think, for the reason stated by us, that the appellant was entitled to the credit of \$100, claimed by him.

PER CURIAM.—The judgment or order of the court below is reversed, at the costs, in this court, of the appellee, and the cause is remanded with instructions to the court to allow the appellant an additional credit of \$50 on the balance in his hands, as such guardian, as found and determined by the court below.

Filed Sept. 27, 1884.

 No. 10,851.

CARTWRIGHT v. YAW.

100	119
125	80

REAL ESTATE, ACTION TO RECOVER.—*Assignment of Chose in Action.*—*Parties.*

—The statute which requires the assignor of a chose in action, without endorsement, to be made a party to answer as to the transfer and his interest therein, does not apply to actions for the possession of real estate and damages for its detention.

SAME.—*Pleading.*—*Cross Complaint.*—*Demurrer.*—*Trespass.*—A cross complaint is not bad on demurrer for charging a trespass sounding in tort, where each party, the plaintiff in his complaint and the defendant in his cross complaint, charges the other with wrongful acts in taking possession of the same real estate, and each sues for possession of the same real estate and damages for its detention.

SUPREME COURT.—*Practice.*—*Bill of Exceptions.*—*Sufficiency of Evidence.*—*Instructions.*—Where the bill of exceptions in the record does not show that it contains all the evidence, the Supreme Court can not decide as to its sufficiency, nor consider the instructions asked or given, unless the instructions given are such as would be erroneous under any supposable state of the evidence.

From the Allen Circuit Court.

J. Q. Stratton and *I. Stratton*, for appellant.

L. M. Ninde, for appellee.

FRANKLIN, C.—Appellant commenced this action against appellee to recover possession of certain real estate.

Appellee filed an answer in denial, a counter-claim and

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cross complaint, setting up a parol lease for one year to the premises, averring an eviction by the plaintiff, and praying for possession and damages for detention.

Demurrers to the counter-claim and cross complaint were overruled. There was a trial by jury, a verdict returned, motions for a new trial and in arrest of judgment, made by the plaintiff, were overruled, and judgment was rendered for the defendant.

The errors assigned are, overruling appellant's motion to strike out the counter-claim and cross complaint, overruling the demurrers to the counter-claim and cross complaint, and overruling appellant's motions for a new trial and in arrest of judgment.

The first and last specifications are not referred to in appellant's brief, and are therefore considered as waived.

The first objection to the counter-claim and cross complaint is, that they show that the lease therein named was made with defendant and one Mills, and although they aver that Mills had transferred all his interest in the lease to defendant, Yaw, still he should have been made a defendant to the counter-claim and cross complaint, to answer as to the transfer and his interest in the subject-matter.

The statute which requires the assignor of a chose in action, without endorsement, to be made a party to answer as to the transfer and his interest therein, does not apply to actions for the possession of real estate, and damages for the detention thereof. Mills was out of possession and was not asserting any claim to or interest in the land. The plaintiff did not make him a defendant in his complaint; and when defendant, in his counter-claim and cross complaint, showed that Mills had transferred all his interest in the lease to the defendant, there was no necessity for making Mills a defendant to the cross complaint.

A further objection to the counter-claim and cross complaint is, that they charge a trespass sounding in tort, and that is not admissible in an action for the possession of real

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estate. Although the lease was joint, the cross action was not upon the lease, but for possession of the land. They do not charge a tort any more than the complaint does. The plaintiff and the defendant each charge the other with wrongful acts, but in the action and cross action each sues the other for possession of the same real estate, and damages for its detention. There was no error in overruling the demurrers to the counter-claim and cross complaint.

Under the motion for a new trial appellant only discusses the sufficiency of the evidence, and the instructions of the court to the jury.

The record contains a bill of exceptions purporting to include some evidence, but it nowhere shows that it embraces all the evidence given upon the trial of the cause. Without all the evidence, we can not decide as to its sufficiency. And without the evidence, we can not consider the instructions asked or given, unless the instructions given are such as would be erroneous under any supposable state of the evidence, and none such have been pointed out. There is no question properly presented to us under the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Jan. 23, 1885.

No. 11,951.

McCASLAND v. KIMBERLIN.

MALICIOUS PROSECUTION.—*Instruction.*—*Malice.*—*Probable Cause.*—In an action for malicious prosecution, an instruction informing the jury that malice may be inferred from the want of probable cause, but that the want of probable cause can not be inferred from malice, is right.

SAME.—*Evidence.*—*Witness.*—*Impeachment, Credibility After.*—In such case, if the defendant testifies as a witness, and impeaching testimony, regarding his reputation for truth and veracity, has been offered against him,

McCasland v. Kimberlin.

it is not erroneous for the court to instruct the jury that they are to determine his credibility under all the facts and circumstances as proved, and that if he "gave a fair, candid and honest statement" of the whole transaction in controversy, they should not disregard his testimony.

From the Sullivan Circuit Court.

J. C. Briggs, C. E. Barrett, J. T. Hays and H. J. Hays,
for appellant.

W. S. Maple, J. S. Bays, J. J. Beasley and A. B. Williams,
for appellee.

BEST, C.—The appellant brought this action for an alleged malicious prosecution. Issue, trial, verdict and judgment for the appellee. A motion for a new trial, on the ground that the verdict was contrary to the evidence, and that the court erred in charging the jury, was overruled, and this ruling is assigned as error.

The evidence is in the record, and we conclude from an examination of it that the verdict is fully supported by it. We can not, therefore, disturb the judgment upon such ground.

No substantial objection is urged to the sixth, seventh and eighth instructions. These define probable cause, and are substantially such as were approved in *Lacy v. Mitchell*, 23 Ind. 67, *Hays v. Blizzard*, 30 Ind. 457, and *Richter v. Koster*, 45 Ind. 440.

The ninth instruction informs the jury that malice may be inferred from the want of probable cause, but the want of probable cause can not be inferred from malice. This was right. *Oliver v. Pate*, 43 Ind. 132; *Benson v. Bacon*, 99 Ind. 156.

The tenth instruction does not inform the jury that the fact that an indictment was found against the appellant was conclusive evidence of probable cause, and it is, therefore, not in fact subject to such objection.

The first, second and third instructions, given at the instance of the appellee, are questioned. No specific objection is made to either of them, and an examination of them leads us to the conclusion that none exists.

The fourth instruction asked by the appellee informed the

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jury that while the law permitted the impeachment of a witness by proof that his reputation for truth and veracity was bad, they were to determine his credibility under all the facts and circumstances as proved upon the trial, and that if the appellee, who testified as a witness, and against whom such impeaching testimony had been offered, "gave a fair, candid and honest statement of the facts and circumstances surrounding the whole transaction in controversy, then they should not disregard his testimony."

This instruction was not erroneous. If the jury believed the witness notwithstanding his attempted impeachment, it was their duty to consider his testimony. *Smith v. Grimes*, 43 Iowa, 356.

This disposes of all the questions in the record, and as the judgment is not erroneous, it should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed Jan. 28, 1885.

No. 11,965.

CLAUSER v. JONES.

PLEADING.—*Argumentative Denial*.—*Demurrer*.—A pleading which contains an argumentative denial of material allegations in the pleading to which it responds, is good on demurrer.

WATERCOURSE.—*Obstruction of*.—*License*.—*Consideration*.—*Argumentative Denial*.—*Demurrer*.—Complaint, alleging that plaintiff and defendant were owners of adjoining lands through which flowed a natural watercourse; that plaintiff, with the knowledge of defendant, expended \$1,000 in tile drains leading into such watercourse on plaintiff's land; that defendant unlawfully filled up and obstructed said watercourse, whereby plaintiff's land was irreparably damaged, etc. Answer, that the obstruction complained of was not of a natural watercourse, but of an artificial outlet to ponds of water, made by plaintiff with license of defendant, which license was granted without consideration, and was afterwards revoked, and the outlet filled up, and that defendant did not obstruct the natural outlet of said ponds.

100	123
152	580
100	123
157	162
100	123
165	653

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Held, that the complaint was sufficient on demurrer.

Held, also, that the answer averred facts constituting an argumentative denial, and was good on demurrer.

SAME—Estoppel.—In such case, if any act was done, or money expended, on the faith of such license, the effect of which would be to prevent the revocation thereof, it should be pleaded.

From the Clinton Circuit Court.

O. E. Brumbaugh, J. W. Merritt and J. V. Kent, for appellant.

W. R. Moore and F. F. Moore, for appellee.

BICKNELL, C. C.—The complaint filed by the appellant alleges that the parties are owners of adjoining lands; that there is a natural watercourse through said lands, ending in Middle Fork creek; that the plaintiff and defendant, for fifteen years past, have removed obstructions from, and have deepened and straightened the channel of said watercourse, and that the plaintiff has so continuously kept and maintained the same upon his land up to the present time; that he made valuable tile drains from all directions through his land, and expended \$1,000 therefor, of which defendant had full knowledge, all of which emptied into said watercourse, and were necessary to render his land tillable, and accomplished that purpose; that in September, 1883, the defendant unlawfully obstructed said watercourse by filling it up with earth and stone and logs and brush; that said obstruction extended on the defendant's land for twenty rods from the line of the plaintiff's land toward said Middle Fork creek, and has been continued by said defendant ever since, whereby the drainage of said watercourse has been entirely destroyed, and plaintiff's tile drains rendered useless, so that sixty acres of the plaintiff's land have been made useless and untillable by standing water, and the plaintiff's entire farm irreparably damaged, and a large quantity of corn in his fields destroyed. The complaint claims \$2,000 damages and all proper relief.

The defendant answered in three paragraphs, to wit:

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1. A general denial.

2. That there are ponds on the plaintiff's land, having a natural outlet through the defendant's land; that the plaintiff, by license from the defendant, cut an artificial outlet for said ponds through the defendant's land, and also from time to time entered upon defendant's land and cleared out said channel for his own benefit; that these licenses were granted without any consideration, and in 1883 were revoked by the defendant, and said artificial channel was filled up by defendant, which is the injury complained of.

3. That there are ponds on the plaintiff's land, having a natural outlet through the defendant's land; that the plaintiff, by license from the defendant, cut an artificial outlet for said ponds through the defendant's land, different from and deeper than said natural outlet, and let the water from said ponds flow through said outlet over the defendant's land; that said license was without consideration; that afterwards the plaintiff cut said outlet to such a depth that the flow of the water from said ponds greatly damaged the defendant's land; that the defendant notified the plaintiff that he would revoke said license, whereupon it was agreed between the parties that the plaintiff should, at his own expense, ascertain a certain line between the lands of the parties, and set and establish certain corner stones, and that in consideration thereof the defendant would not revoke said license; that the plaintiff wholly refused to perform any part of his said contract, and thereupon the defendant revoked said license and filled up said artificial outlet, which is the injury complained of, and that in so doing the defendant did not obstruct the said natural outlet of said ponds.

The plaintiff filed a separate demurrer to each of the second and third paragraphs of said answer. These demurrers were overruled by the court; the plaintiff made no reply, and judgment was rendered for the defendant upon the demurrers. The plaintiff appealed. There was no error in overruling the demurrers.

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The complaint alleged the obstruction of a natural watercourse. The allegations of each of the paragraphs of answer are that there was no such obstruction ; they are, in part, substantially, argumentative denials of the complaint, and such part could have been given in evidence under the general denial. To allege that there was no obstruction of a natural watercourse, and that the only obstruction was that of an artificial outlet of a pond, which outlet was constructed under a license granted without consideration and afterwards revoked, is to deny argumentatively the cause of action stated in the complaint. The following language of this court, in *Loeb v. Weis*, 64 Ind. 285, is in point : " The paragraph of answer contains facts constituting a defence to the action ; and, while the party might have been permitted to give them in evidence under the general denial, which was pleaded, yet he had a right to plead the facts specially, and, having done so, it was not error in the court below to overrule a demurrer to such special paragraph. Such is the settled law of this State."

So, in *Stoddard v. Johnson*, 75 Ind. 20, this court said : " An argumentative denial, deduced from facts well pleaded, is equivalent to a special denial of the inconsistent averments of the complaint, and will be good on demurrer, if it goes far enough."

A pleading which contains an argumentative denial of material allegations in the pleading to which it responds is good on demurrer. *Judah v. Trustees of Vincennes University*, 23 Ind. 272 ; *Burns v. Stanley*, 72 Ind. 350 ; *State, ex rel., v. Wylie*, 86 Ind. 396 ; *Barkley v. Mahon*, 95 Ind. 101.

The demurrers in the present case admit that there was no obstruction of a natural watercourse, and that the obstruction complained of was of an artificial outlet, made by license, which license was granted without consideration, and was afterwards revoked. If there was any act done or money expended on the faith of the license, the effect of which would be to prevent the revocation of such a license to make an artificial outlet, it ought to be shown by some appropriate pleading.

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Buchanan v. Logansport, etc., R. W. Co., 71 Ind. 265. The allegation in the complaint in reference to a natural watercourse, that the plaintiff, with the knowledge of defendant, expended \$1,000 in tile drains leading from all directions into such watercourse on the plaintiff's own land, does not show that the defendant is estopped from revoking a parol license granted without consideration, for the building of such an artificial outlet for a pond as is described in the answer. If the complaint had averred a license, and expenses incurred on the faith of the license, a different matter would be presented, although even in that case it would be questionable whether a license to improve a watercourse would authorize the licensee to increase the flow of water by leading into it drains from all directions.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 22, 1885. Petition for a rehearing overruled March 14, 1885.

No. 10,984.

MCLEAN, ADMINISTRATOR, v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

LIFE INSURANCE.—*Procuring Settlement of Claim by Fraudulent Representations.*—*Agent.*—*Executor.*—Where a life insurance company, by its authorized agent, falsely and fraudulently represents to the assured's executor, whose mental faculties are at the time impaired by age, financial disasters and domestic affliction, that sufficient evidence has been discovered to avoid the policy, and that such company will contest and defeat its collection, and thereby procures a settlement of the claim and the surrender of the policy, by paying an amount grossly unjust to the estate of the assured, such settlement may be set aside and the balance due on the policy recovered.

SAME.—*Payment before Due.*—*Consideration.*—The fact that the insurance

100	127
129	118
100	127
130	536
100	127
134	146
135	684
100	127
156	72

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company paid such money to the executor a few days before he could have legally demanded and enforced its payment, is immaterial, where it does not appear that such payment constituted any part of the consideration for the settlement.

SAME.—Pleading.—Complaint.—Exhibit.—A paragraph of complaint, founded on a policy of insurance, which fails to make the policy or a copy thereof a part of the pleading, or to show a sufficient excuse for not doing so, is bad.

SAME.—Demurrer to Evidence.—Application of Evidence.—Harmless Error.—But where there is a demurrer to evidence which fully sustains another paragraph, which is sufficient, it is the duty of the court to apply the evidence to such paragraph and render judgment thereon; and, in such case, overruling a demurrer to the bad paragraph is a harmless error.

DEMURRER TO EVIDENCE.—Effect of.—A demurrer to evidence concedes the truth of all the facts which the evidence demurred to tends to prove, and all such inferences as can reasonably be drawn therefrom, and if there is evidence favorable to the party demurring, the court can not consider it when it is in conflict with that against him.

SAME.—Waiver.—Such demurrer waives objection to the admissibility of the evidence to which it is directed, and excludes from consideration that offered by the party demurring.

SAME.—Objections to Pleadings.—Such demurrer can not be sustained because of any defect in the pleadings, but it does not waive objections thereto.

SAME.—If, from the evidence, a jury might infer that the plaintiff's action should be sustained, the defendant's demurrer should be overruled and the plaintiff have judgment.

PRACTICE.—Motion to Strike Out.—Overruling a motion to strike out parts of a pleading, even if erroneous, is not an available error.

From the Vigo Circuit Court.

W. E. McLean, C. F. McNutt, J. G. McNutt, N. G. Buff and J. T. Pierce, for appellant.

J. M. Allen, W. Mack, H. C. Nevitt, S. C. Davis and S. B. Davis, for appellee.

COLERICK, C.—This action was originally brought by Lucius Ryce, as executor of the last will of his son William S. Ryce, deceased, to recover an alleged balance due upon an insurance policy issued by the appellee upon the life of said William S. Ryce, for the sum of \$10,000, payable on the 25th day of July, 1888, to the assured, if he should then

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be living, and in the event of his death before that time, then to his executors, administrators or assigns, in sixty days after due notice and proof of his death. During the pendency of the action said executor died, and the appellant, as the administrator *de bonis non* of the estate of the assured, was substituted as the plaintiff therein.

The complaint consisted of three paragraphs, to which separate demurrers were overruled. A motion was made to strike out parts of the complaint, which was also overruled, and thereupon the appellee answered the complaint, to which answer a reply was filed. The issues so formed were submitted to a jury for trial, and after the appellant had introduced his evidence in support of the complaint, the appellee demurred to the evidence, and the demurrer was sustained by the court, to which ruling the appellant duly excepted, and thereupon final judgment was rendered in favor of the appellee, from which the appellant appeals, and assigns as error, for its reversal, the ruling of the court in sustaining said demurrer.

The appellee has filed an assignment of cross errors, in which it assigns as errors the rulings of the court upon the demurrers to the several paragraphs of the complaint, and on the motion to strike out parts of the complaint. It is unnecessary to refer more specifically to the pleadings in the action, except the complaint.

The first and second paragraphs, in their material averments, were, in substance, alike. They both averred the issuing by the appellee of the policy of insurance above referred to, and its acceptance by the assured, who, until his death, observed and performed all of the conditions of the policy on his part, and the appointment and qualification of the plaintiff as such executor, and the furnishing by him of the proof, required by the policy, of the death of the assured, and alleged that the appellee, by certain false and fraudulent representations made by its authorized agent,

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which were fully recited therein, induced the plaintiff to settle the claim existing in favor of the estate of the assured upon said policy, by accepting and receiving in full payment thereof \$7,000 less than the amount actually and legally due thereon, and prayed judgment against the appellee for the difference between the sum so paid and the amount that was due on the policy.

The third paragraph was founded on the policy of insurance, but, unlike the other paragraphs, failed to aver any excuse for not making the policy, or a copy thereof, a part of the pleading.

The vital question presented for our consideration is, Did the court err in sustaining the demurrer to the evidence? Before presenting a synopsis of the evidence, it is proper, if not essential, for us to advert to certain rules that have been established for the guidance of courts in the consideration by them of the evidence in a cause, where, as in this case, a demurrer to the evidence has been interposed. The effect of the demurrer is to concede the truth of all the facts of which there is any evidence against the demurring party, and, if there is a conflict in the evidence, prevents him from insisting upon the benefit of any evidence in his favor as to the disputed facts. *Willcuts v. Northwestern Mutual Life Ins. Co.*, 81 Ind. 300. The demurrer admits all facts which the evidence tends to prove, and all such inferences as can be reasonably drawn therefrom. *Willcuts v. Northwestern Mutual Life Ins. Co.*, *supra*; *Radcliff v. Radford*, 96 Ind. 482. It excludes from consideration the evidence of the party demurring—*Ruddell v. Tyner*, 87 Ind. 529—which is to be treated as withdrawn—*Adams v. Slate*, 87 Ind. 573—as the evidence of his adversary alone is involved in the issue raised by the demurrer. *Fritz v. Clark*, 80 Ind. 591.

If, upon such evidence, with every reasonable inference which may be drawn therefrom, a jury might rightfully find against the party demurring, the demurrer should be overruled—*Hagenbuck v. McClaskey*, 81 Ind. 577, *Nordyke &*

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Marmon Co. v. Van Sant, 99 Ind. 188—as the party by demurring admits all facts of which there is any evidence—*Trimble v. Pollock*, 77 Ind. 576—and consents that whatever reasonable inferences can be shall be drawn from the evidence against him—*Ruff v. Ruff*, 85 Ind. 431—and the court is bound to take as true all the facts which the evidence tends to prove, and such inferences from them as the jury could have fairly drawn, though the jury might not have drawn them. *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261. But the court is not required in considering the demurrer to weigh or reconcile conflicting evidence, nor consider that which favors the party demurring when it is in conflict with other evidence against him. *Indianapolis, etc., R. R. Co. v. McLin*, 82 Ind. 435. The demurrer waives objections to the admissibility of the evidence—*Miller v. Porter*, 71 Ind. 521—and no advantage can be taken of any defect in the pleadings as a reason for sustaining the demurrer. *Lindley v. Kelley*, 42 Ind. 294. As sustaining a demurrer to evidence works a final disposition of the case, the court does not err in overruling such a demurrer whenever there is testimony which, although weak and inconclusive, fairly tends to prove every material fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon. *Kansas Pacific R. W. Co. v. Couse*, 17 Kan. 571. And if from the evidence a jury might infer that the plaintiff's action should be sustained, the demurrer should be overruled, and the plaintiff should have judgment. *Wright v. Julian*, 97 Ind. 109.

Keeping in view and applying to this case, so far as they are applicable, the rules to which we have referred, we will briefly present the facts in the case.

It appears by the evidence that the assured was, for many years before and at the time of his death, a dry goods merchant in the city of Terre Haute, Indiana. He died at Grand Haven, Mich., on the 18th day of August, 1877, of chronic inflammation of the stomach, with which he had been afflicted

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for two or three years immediately preceding his death. The policy of insurance referred to in the complaint was issued to him by the appellee on the 2d day of August, 1865, upon which he paid to the appellee each year thereafter until his death, covering a period of twelve years, the annual premiums thereon, as they became due and payable, amounting in all to \$4,680.80. No evidence was introduced even tending to prove that any misrepresentations were made by him in his application, or otherwise, to secure the issuing of the policy, or that he in any manner after its issue violated any of its conditions. He was about forty-three years old at the time of his death. By the provisions of his will he appointed his father, Lucius Ryce, now deceased, the executor thereof, and he, after first qualifying as such executor, furnished appellee with the proof required by the policy, as to the time, place and cause of the death of the assured. About the 19th day of October, 1877, the appellee sent an agent to Terre Haute, Indiana, where the executor resided, to adjust the claim, and, for that purpose, the agent called several times upon the executor, and had interviews with him in relation to its adjustment. The only evidence as to what transpired between them at these interviews was rendered by the executor, who stated that the agent informed him that the policy was not "worth a cent;" that he had been to Grand Haven, Mich., where the assured died, and discovered "something" that "was fatal to the policy," and had secured sufficient evidence "to defeat the policy," and that the company would not pay the claim, but would contest the same. After the agent had impressed the executor with the belief that the company would not pay the claim, and that the company could, and would, defeat its collection, he stated to the executor that he thought it would be right for the company to pay the sum that the assured had paid to the company, with interest thereon; and after computing the amount thereof, he offered to pay the same in full payment of the claim, which offer the executor accepted, and surrendered the policy. He also testified that at the time these

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interviews occurred and the settlement was made, he was "in great distress of mind," and "was hardly fit to do business," and "did not know what he ought to do," and that debts were troubling him which he wanted to pay but could not, and that he "had sacrificed everything he had of his own to pay the debts," and that he had been induced to accept the offer of settlement by reason of the representations that were made by the agent.

The facts to which the executor testified, above set forth, were not disputed, nor was his evidence in conflict with, or impaired by, any other evidence rendered in the cause, but, on the contrary, was strongly supported and corroborated in many of its essential features by other evidence. A number of prominent business men of the city of Terre Haute, Indiana, who were personally and intimately acquainted with him, and had been for many years, testified that from the time of the death of his son, and for months afterwards, embracing the time when the settlement occurred, he appeared to be in great mental distress, caused by the death of his son and his own financial embarrassments as the surety of his son. His liabilities as such surety amounted to about \$80,000, and to pay them he sacrificed all of his property. He was about seventy-three years old at the time of the settlement, and was then very feeble in body and mind. It was admitted on the trial that at the time of the settlement the policy and its accumulations, by way of dividends, amounted in all to \$12,078. The amount that was paid by the appellee under said settlement was \$7,136.08, which was \$4,941.92 less than the amount that was due on the policy. The representations so made by the agent of the appellee were false, and we think fraudulently made by him to induce the settlement.

The question presented to us by these facts is whether the law will permit the appellee, under a settlement procured by such means, to withhold the payment of the balance that was confessedly due to the plaintiff, as such executor, on the policy, and thereby enable the appellee to secure and enjoy

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the fruits of the fraud that was committed by its agent in inducing, by false and fraudulent representations, an aged man whose mental faculties were impaired and shattered by age and financial disasters, and whose heart was sorely afflicted by domestic calamities, rendering him helpless to resist the influence of the cunning arts that were practiced upon him by the wily and unscrupulous agent, to enter into a contract that was, in its terms, grossly unjust to the estate which he represented. We think not. The law is strong, and protects the weak and helpless against such machinations, and, being just, defeats their consummation. See *McCormick v. Malin*, 5 Blackf. 509; *Marshall v. Billingsly*, 7 Ind. 250; *Wray v. Wray*, 32 Ind. 126. The evidence sustained the averments in the first and second paragraphs of the complaint, and the court should have rendered judgment thereon in favor of the appellant. The fact that the money received by the executor was paid to him by the appellee a few days before the time that he could have legally demanded and by suit enforced its payment, is of no consequence, as it does not appear by the evidence that its payment before maturity was the consideration, in whole or in part, for the settlement of the claim. It is unnecessary to consider or determine the question presented by the appellee as to the power of the executor, under the provisions of the will, to adjust and settle the claim without first applying to the court for an order authorizing and empowering him to do so, as the fraud that was practiced by the appellee, through its agent, vitiated and destroyed the legality of the settlement that was made.

The appellee insists that the court erred in overruling the demurrers to the several paragraphs of the complaint. We think that the first and second paragraphs were sufficient. The third was insufficient, because it was founded on the policy of insurance, and failed to make the policy or a copy thereof a part of the pleading, or, by proper averments, show a sufficient excuse for not doing so. The appellant seeks to

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avoid the effect of the erroneous ruling of the court in overruling the demurrer to this paragraph of the complaint, by asserting that the objection thereto, if well taken, was waived or abandoned by the appellee in demurring to the evidence, and that he is precluded thereby from now assailing in this court, on appeal, the sufficiency of the complaint. This question has been considered and determined by the Supreme Court of the United States, in *United States Bank v. Smith*, 11 Wheat. 171 (24 U. S. 171), where it was correctly, we think, said: "It is alleged, however, on the part of the plaintiffs, that this court can not look beyond the demurrer to the evidence, and inquire into defects in the declaration. This position cannot be sustained. The doctrine of the King's Bench, in England, in the case of *Cort v. Birkbeck*, 1 Doug. 208, that, upon a demurrer to evidence, the party can not take advantage of any objections to the pleadings, does not apply. By a demurrer to the evidence, the court in which the cause is tried is substituted in place of the jury. And the only question is, whether the evidence be sufficient to maintain the issue. And the judgment of the court upon such evidence, will stand in the place of the verdict of the jury. And after that, the defendant may take advantage of defects in the declaration, by motion in arrest of judgment, or by writ of error. But the present case being brought here on writ of error, the whole record is under the consideration of the court; and the defendant, having the judgment of the court below in his favor, may avail himself of all defects in the declaration, that are not deemed to be cured by the verdict." This decision is in harmony with the views recently expressed by this court in *Bish v. Van Cannon*, 94 Ind. 263, where it was said: "But upon appeal we see no good reason why the demurrer to the evidence should waive the demurrer to the complaint; by the demurrer to the complaint being overruled, the defendant was compelled to take issue upon the complaint as it was, and submit to a trial. A demurrer to evidence is only one of the modes of trial, and

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only tests the sufficiency of the evidence." It is true that the question was not decided by this court in the case last cited, but we now hold that a party who demurs to the evidence is not thereby precluded from afterwards presenting to this court, on appeal, questions arising upon the pleadings which he may have properly reserved in the court below, or from assailing by motion in arrest of judgment, or assignment of error in this court, the sufficiency of the complaint, the same as if no such demurrer had been filed, as objections to the pleadings in an action are not to be deemed as waived by demurring to the evidence.

Although the court below erred in overruling the demurrer to the third paragraph of the complaint, it was a harmless error, as the evidence in the cause fully and clearly sustained the first and second paragraphs of the complaint, which were sufficient, and under which the evidence was evidently introduced. It was the duty of the court below to have applied the evidence to those paragraphs, and rendered judgment thereon alone in favor of the appellant. See *Stolle v. Aetna Fire and Marine Ins. Co.*, 10 West Va. 546, which was an action, like this, on a policy of insurance. The complaint consisted of two paragraphs, to which demurrers were overruled, and thereupon issues were formed thereon and tried by the court. A demurrer to the plaintiff's evidence was filed and overruled, and judgment rendered in favor of the plaintiff. On appeal to the Supreme Court the judgment was affirmed, although it was held that the court below erred in overruling the demurrer to the first paragraph of the complaint. The court said: "The evidence then sustaining the plaintiff's case as set forth in the second, or general count, the court properly entered up the judgment for the plaintiff, and it should not be set aside because the first count was defective, and the demurrer to it ought to have been sustained. For though the court erred in overruling this demurrer to the first count, and would also have erred in rejecting the special plea" (answer) "had it been in proper form. Yet as these errors of the court

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have resulted in no injury to the defendant, there being a demurrer to the evidence, the court sees the whole case, and being of opinion that the evidence received by the court, was all properly received upon the issue joined on the second count, and that this second count was supported by the evidence, find no error injurious to the defendant."

If the court below in this case had so performed its duty, it would have appeared affirmatively by the record that no judgment was rendered in favor of the plaintiff on the third paragraph of his complaint, and in the face of such a record the appellee would have been precluded from assailing in this court the correctness of the ruling of the court below in overruling the demurrer thereto, as the ruling, if erroneous, would have been regarded and treated, under the well settled practice of this court, as a harmless error, of which the appellee could not complain. See *Johnson v. Ramsay*, 91 Ind. 189; *Buskirk Pr.* 284; 1 *Works Pr.*, section 538; *McComas v. Haas*, 93 Ind. 276; *State v. Julian*, 93 Ind. 292, and the cases there cited; *Bartlett v. Pittsburgh, etc., R. W. Co.*, 94 Ind. 281; *Louisville, etc., R. W. Co. v. Davis*, 94 Ind. 601.

The court below having failed to so apply the evidence, it became necessary for us to examine and consider it with reference to those paragraphs of the complaint, which we have done, and find that it is amply sufficient to sustain them, and, therefore, we think that the court erred in sustaining the demurrer to the evidence, and for the error so committed the judgment ought to be reversed.

It is insisted by the appellee that the court erred in overruling the motion to strike out parts of the complaint. If any error was committed by the court in its ruling, it is not an available one. As stated by this court in *Rowe v. Major*, 92 Ind. 206, "It will suffice to say that, under repeated decisions of this court, even if the ruling were erroneous, it would not constitute an available error for the reversal of the judgment. The motion to strike out is based upon the theory that the objectionable matter in the pleading

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is mere surplusage; and where the motion is overruled, the effect of the ruling is, at most, to leave surplusage in the record, which will not vitiate the pleading, if it is otherwise good." See, to same effect, *Losey v. Bond*, 94 Ind. 67. Nor was the ruling properly reserved for our review, as it was not embodied, as it should have been, in a bill of exceptions.

The following recital appears in the record at the conclusion of the evidence: "It is at this point agreed by and between the parties that at the time when the receipt was made, the policy and its accumulations amounted to \$12,078." The receipt was executed on the 19th day of October, 1877, and the sum paid by the appellee on the policy was \$7,136.08, being \$4,941.92 less than the sum that was due thereon.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellee, and the cause is remanded, with instructions to the court to overrule the demurrer to the evidence, and render judgment in favor of the appellant on the first and second paragraphs of the complaint for \$4,941.92, with six per cent. interest thereon from the 19th day of October, 1877, with costs.

Filed Dec. 11, 1884. Petition for a rehearing overruled April 23, 1885.

No. 11,585.

THE PENNSYLVANIA COMPANY v. WEDDLE.

RAILROADS.—*Principal and Agent.*—*Liability for Acts of Agent.*—*Torts.*—

Where a corporation employs an agent to detect and arrest offenders against its property, and such agent, acting within the general scope of his employment, arrests an innocent man, such corporation is liable therefor, although the particular act was not directly authorized.

SAME.—*Evidence.*—*Declarations of Agent.*—In an action by the injured person for damages, he may give in evidence the declarations of the agent made at the time of the arrest.

MALICIOUS PROSECUTION.—*Good Character of Plaintiff.*—Evidence of the good character of the plaintiff, in actions for malicious prosecution, is competent.

100	138
136	184
100	138
135	590

100	138
138	157
100	138
141	88

100	138
149	133

100	138
155	54
155	58

100	138
167	546

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SAME.—Evidence.—Probable Cause.—Evidence of information received before preferring the charge, by the person who institutes a prosecution for a criminal offence, and tending to establish the guilt of the person prosecuted, is competent as to the question of probable cause, but evidence of information received after the charge has been preferred is not.

SAME.—Province of Court and Jury.—Instructions.—Hypothetical Statement.—In an action for malicious prosecution, if the facts are not disputed, the court must decide as matter of law, whether they constitute probable cause; but where the facts are disputed the court must hypothetically state the material facts which there is evidence fairly tending to prove, and positively direct as to the law thereon, leaving to the jury to determine the existence or non-existence of the facts.

INCOMPLETE INSTRUCTIONS.—Instructions which profess to fully state the law upon a particular subject, but which omit some material fact, essential to the validity of the hypothesis, may be properly refused.

From the Bartholomew Circuit Court.

S. Stansifer, for appellant.

G. W. Cooper, *C. B. Cooper* and *M. D. Emig*, for appellee.

ELLIOTT, J.—The questions in this case arise on the ruling denying appellant a new trial. The material facts which the evidence tended to establish are these: The appellee was arrested upon an affidavit made by James H. Mowatt and was cast into prison where he remained for thirteen days, and was then discharged without a trial. Mowatt had been employed, as is stated in answer to interrogatories propounded by the appellee, "about the middle of August, 1883, as a detective, for the purpose, in connection with the aid and assistance of the proper local police officers, of detecting, and to aid in procuring the punishment of persons not merely supposed by him, or other said officers, to be guilty of crimes against the property of defendant, but his employment and instructions were to investigate fully and fairly all the facts and circumstances, and to make report and only arrest upon the direction of the attorneys or officers of the corporation." Prior to Mowatt's appointment, February 6th, 1883, a box of shoes was stolen from appellant's cars, and the affidavit of Mowatt charged the appellee with the larceny and caused his arrest and imprisonment. The shoes were not stolen by the appel-

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lee, but were stolen by John Bradley and Sanford Osborn, who were convicted, upon their own confession, and sent to the State's prison. The thieves, after taking a number of shoes from the box, threw it and its contents into Flat Rock river. The river was then very high and the box was carried down and lodged upon an island from which the water receded as the river fell to its usual stage. John Ferguson and the appellee, while engaged in taking driftwood from the river, found the box. They made no concealment of that fact; they informed the first person they met that they had found a box of shoes; they carried some of them to town and gave notice to many persons of the finding, among others, to the judge of the circuit court. But while there was evidence tending to establish these facts, there was conflict upon some points, and there was also evidence tending to prove other facts favorable to the appellant.

There are several general propositions which are now well settled, and these propositions we state at the outset without amplifying them or applying them in detail to the evidence, for it is apparent from their statement that they exert a controlling influence upon the case in judgment:

First. An action for malicious prosecution, or for false imprisonment, may be maintained against a corporation. *Evansville, etc., R. R. Co. v. McKee*, 99 Ind. 519; *American Ex. Co. v. Patterson*, 73 Ind. 430; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Ricord v. Central Pacific R. R. Co.*, 15 Nev. 167; *Edwards v. Midland R. W. Co.*, 1 Am. & Eng. R. R. Cases, 571; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. Ap. 505; *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *Carter v. Howe Machine Co.*, 51 Md. 290.

Second. A corporation is responsible for the acts of an agent performed while engaged in the discharge of duties within the general scope of his agency, although the particular act was wilful and was not directly authorized. *Evansville, etc., R. R. Co. v. McKee, supra*; *Louisville, etc., R. R.*

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Co. v. Kelly, 92 Ind. 371; S. C., 47 Am. R. 179; *Terre Haute, etc., R. R. Co. v. Jackson*, 81 Ind. 19.

Third. A corporation that entrusts a general duty to an agent is responsible to an injured person for damages flowing from the agent's wrongful act, done in the course of his general authority, although in doing the particular act the agent may have failed in his duty to the principal, and may have disobeyed instructions. *Story Agency*, section 73; *Higgins v. Waterliet, etc., R. R. Co.*, 46 N. Y. 23; S. C., 7 Am. R. 293; *Evansville, etc., R. R. Co. v. McKee, supra*; *Pierce R. R.* 277; 2 *Rorer R. R.* 821.

Fourth. A principal who selects an agent to detect and arrest offenders is responsible for the acts of the agent committed within the general scope of his employment, although the agent may have done an unlawful act and have arrested an innocent man. *Evansville, etc., R. R. Co. v. McKee, supra*, and authorities cited.

It was proper to permit the appellee to give in evidence the declarations of Mowatt made at the time he arrested the appellee. Two valid reasons support this conclusion: 1st. Where an act is competent, so, also, are the declarations of the persons engaged in its performance and constituting a part of the thing done. *Creighton v. Hoppis*, 99 Ind. 369; *Baker v. Gausin*, 76 Ind. 317. 2d. The declarations of an agent, made at the time he is actually engaged in the performance of an act within the line of his duty, are admissible against the principal. *Trustees, etc., v. Bledsoe*, 5 Ind. 133; *Hudspeth v. Allen*, 26 Ind. 165; *Toledo, etc., R. W. Co. v. Goddard*, 25 Ind. 185; *Hynds v. Hays*, 25 Ind. 31; *Hunter v. Leavitt*, 36 Ind. 141; *Heller v. Crawford*, 37 Ind. 279; 1 *Greenl. Ev.*, sections 113, 114.

Evidence of the good character of the plaintiff, in actions for malicious prosecution, is competent. *American Ex. Co. v. Patterson*, 73 Ind. 430, *vide* p. 438; *Blizzard v. Hays*, 46 Ind. 166; *Shannon v. Spencer*, 1 Blackf. 526; *Israel v. Brooks*, 23 Ill. 526.

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Evidence of information received by the person who institutes a prosecution for a criminal offence, before preferring the charge, and tending to establish the guilt of the person prosecuted, is competent for the purpose of enabling the jury to determine whether there was probable cause for the prosecution; but evidence of information received after the charge has been preferred is not competent for that purpose. Information, in order to be competent for this purpose, must have been imparted to the person who instigated the prosecution before he preferred the charge. The facts known to the person making the charge at the time it is preferred are the ones which exert a controlling influence, and not information subsequently received. In determining the question whether there was or was not probable cause, the influences which were at work at the time the prosecution was instituted are those which must control the investigation. "Probable cause," says the Supreme Court of Massachusetts, "is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." *Bacon v. Towne*, 4 Cush. 217, *vide op.* 238. Hilliard says: "Those facts and circumstances which were known to the prosecutor at the time he instituted the prosecution are to be alone considered, in determining the question of probable cause." 1 Hill. Torts 451. Much to the same effect is the statement of Professor Greenleaf: "And, in either case, it must appear that the facts, or so much of them as was sufficient to induce the belief, were communicated to the defendant before he commenced the prosecution or suit." 2 Greenl. Ev., section 454. In *Galloway v. Stewart*, 49 Ind. 156, it was held that the facts constituting probable cause must be known to the prosecutor at the time he prefers the charge, and it was said: "That the facts constituting probable cause must be known to the party preferring the charge, is expressly stated in some of the cases in this court, and is clearly implied in others."

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The prosecution against the appellee was commenced when the affidavit was filed and the warrant issued. The authorities go farther, for they declare that the prosecution is so far set on foot as to give a cause of action when the affidavit making the charge is filed, even though no warrant was issued. *Coffey v. Myers*, 84 Ind. 105, and authorities cited. The cause of action was, therefore, vested in the appellee when the charge was preferred.

The case of *Turpin v. Remy*, 3 Blackf. 210, does not decide that it is essential to the maintenance of an action for a malicious prosecution to show that there was an arrest, but does decide that the action can only be maintained for the malicious prosecution of the plaintiff before some judicial officer or tribunal. This court has adopted the doctrine of Blackstone, Hilliard, and other text-writers, that it is not essential that an arrest should be made in order to create a cause of action, and in this it is well sustained by the adjudged cases. *Coffey v. Myers*, *supra*, and authorities cited; *Stanciliff v. Palmeter*, 18 Ind. 321; *Collins v. Love*, 7 Blackf. 416; *Stapp v. Partlow*, Dudley (Ga.) 176; *Closson v. Staples*, 42 Vt. 209; S. C., 1 Am. R. 316.

In the well considered case of *Elsee v. Smith*, 2 Chitty R. 304, BAYLEY, J., said, in speaking of a party who prefers a criminal charge: "but if he falsely and maliciously, and without any probable cause, puts the law in motion, that is properly the subject of an action on the case." Our cases have, indeed, gone so far as to hold that an action for malicious prosecution will lie although no arrest could have been made. *Lockenour v. Sides*, 57 Ind. 360; S. C., 26 Am. R. 58; *McCardle v. McGinley*, 86 Ind. 538. This doctrine is well sustained by authority. *Pedro v. Barrett*, 1 Ld. Raymond, 81; *Norris v. Palmer*, 2 Modern, 51; *Closson v. Staples*, *supra*; *Marbourg v. Smith*, 11 Kan. 554; *Burnap v. Albert*, Taney C. C. Dec. 244; *Whipple v. Fuller*, 11 Conn. 582; *Cox v. Taylor*, 10 B. Mon. 17; *Easton v. Bank, etc.*, 31 Albany L. J. 63.

The appellant asked several instructions upon the subject

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of probable cause, and endeavored to secure from the court a declaration of the law upon the facts hypothetically assumed in the instructions, but the court refused to give them to the jury. We are inclined to think that most, if not all, of the instructions asked by the appellant were too narrow in their assumption of the facts proved, and that, for this reason, there was no error in refusing them, although they were correct in asserting that the question of what facts constitute probable cause is one of law to be decided by the court. Instructions which profess to fully state the law upon a particular subject are faulty if they omit any material fact essential to the validity of the hypothesis.

The instructions given by the court upon the subject of probable cause left to the jury the question of whether the facts constituted probable cause. This was error. It was for the jury to find the facts, and for the court to decide whether or not the facts constituted probable cause for the prosecution. The authorities are well agreed that whether the facts proved or assumed do or do not constitute probable cause, is a question of law to be decided by the court, and not by the jury. In *Brown v. Connelly*, 5 Blackf. 390, it was said: "Whether any given facts amount to a probable cause for the prosecution, is a question of law. *Johnstone v. Sutton*, 1 T. R. 545; *Blachford v. Dod*, 2 B. & A. 179." The court, in *Panton v. Williams*, 2 G. & D. 504, said: "It is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge." The same doctrine is thus expressed by another court: "Whether the circumstances alleged to show it probable are true and existed, is a matter of fact for the jury. But whether, supposing them true, they amount to probable cause, is a question of law for the court." By the same court it was said: "Either party, upon request, would have been entitled to a

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direct and specific instruction from the presiding judge, as to whether the alleged facts set up in defence, if proved, did or did not show want of probable cause." *Humphries v. Parker*, 52 Maine, 502; *Pullen v. Glidden*, 68 Maine, 559. In a note to the text the American editor of Addison on Torts, says: "What facts and circumstances amount to probable cause, is wholly a question for the court." 2 Addison Torts (Wood's ed.), section 853, n. Another author says: "The existence of reasonable and probable cause is a question of law for the judge." Moak's Underhill Torts, 166. By another author it is said of the question of probable cause, that "it is now conclusively settled that it is one of law." Prof. Jury Trials, section 271. On the same subject still another author says, in speaking of the question of probable cause, that "It is to be determined by the court as a question of law." Wells Questions of Law and Fact, section 291. The rule upon the subject is, for practical purposes, rather better stated by Hilliard than by the other authors. This author says: "If there are contested facts, he" (the judge) "should charge the jury hypothetically, upon the state of facts claimed by each party." At another place it is said: "A party has a right to the opinion of the court distinctly on the law, on the supposition that he has established, to the satisfaction of the jury, certain facts." 1 Hill. Torts, 460, sec. 23. It would not be profitable to cite the cases upon this subject, and we refer only to a few of the many which we have examined. *Vinal v. Core*, 18 West Va. 1; *Stewart v. Sonneborn*, 98 U. S. 187; *Cole v. Curtis*, 16 Minn. 182; *Driggs v. Burton*, 44 Vt. 124; *Grant v. Moore*, 29 Cal. 644.

In a limited sense, the question of whether there is or is not probable cause is one of mixed law and fact, but it is not so in such a sense as to permit the court to surrender its function of deciding questions of law, nor to usurp that of the jury to decide questions of fact. The question is one of mixed law and fact thus far, and no farther, namely: When the facts

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are contested, the jury decides the contest as to the facts, but in all cases the court instructs them as to the law upon the facts. In *Pangburn v. Bull*, 1 Wend. 345, it was said: "The court below erred in submitting both the law and the fact to the jury." A like ruling was made in *McCormick v. Sisson*, 7 Cowen, 715, and in speaking of these decisions the court said, in the subsequent case of *Masten v. Deyo*, 2 Wend. 424: "They do not disapprove of *submitting* such questions to the jury, but they condemn the *manner* in which they were submitted. They by no means imply that the court ought to assume the province of the jury and pass upon the facts, in case facts are in dispute; but they disapprove of the surrender by the court of its own function—the exercise of the right to pronounce the law to the jury." In speaking of this subject, the Supreme Court of the United States said: "It is true that what amounts to probable cause is a question of law in a very important sense." After citing some authorities, the court further said: "It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not." *Stewart v. Sonnenborn*, *supra*. It was said by DUER, J., in *Bulkeley v. Smith*, 2 Duer, 261, that "It is true, it is said, by many of the text-writers, that probable cause is 'a mixed question of law and fact;' and, misled by this statement, it not unfrequently happens that judges content themselves with defining a probable cause, leaving the jury to decide whether the facts of the case correspond with the definition, which is, in effect, leaving the whole matter to their determination. It is evident, however, upon reflection, that the deceptive phrase, 'a mixed question of law and fact,' is either wholly unmeaning, or is intelligible and true only in a sense which renders it just as applicable to every question of law that a judge in the progress of a trial can be required to determine." In a subsequent part of the opinion, the court said: "If, instead of such a direction, he leaves it

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to the jury to determine not only whether the facts alleged by the plaintiff are true, but whether, if true, they prove a want of probable cause, he abjures his own functions, and commits a fatal error." In the course of the opinion in *Cole v. Curtis*, *supra*, it was said: "What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, the latter for the jury. This subject must necessarily be submitted to the jury when the facts are in controversy, the court instructing them what the law is. *Stone v. Crocker*, 24 Pick. 81; 2 Greenl. Ev., section 454; *Center v. Spring*, 2 Iowa, 393; *Ash v. Marlow*, 20 Ohio, 119; *Blachford v. Dod*, 2 B. & A. 179 (22 Eng. C. L. 52); *Kidder v. Parkhurst*, 3 Allen, 393." The case of *Potter v. Seale*, 8 Cal. 217, declares that "Whether the alleged circumstances existed or not, is simply a question of fact, and conceding their existence, whether or not they constitute probable cause is a question of law." To the same effect are the cases of *Israel v. Brooks*, 23 Ill. 526, *Wade v. Walden*, 23 Ill. 369, *Grant v. Moore*, 29 Cal. 644, see op. 649.

It is clear from the authorities, that where the facts are not disputed the court must decide, as matter of law, whether they do or do not constitute probable cause; but where they are disputed, then the court must hypothetically state the material facts which there is evidence fairly tending to prove, and positively direct as to the law upon the assumed state of facts. Where the evidence is conflicting, the court must charge the law upon the conflicting theories, and in no event leave the question of law to be decided by the jury, since that would be a surrender of the functions of the judge, which the law will not allow him to make. A judge can neither evade nor escape the duty of declaring the law to the jury. The two provinces of court and jury are essentially distinct, and the court, while not allowed to decide questions of fact, can not abdicate its own functions by leaving to the jury the decision of questions of law. The confusion into which a few of the

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courts have fallen is attributable to the fact that they have lost sight of the distinction between the two provinces, and have forgotten that there are in almost every case two elements, one of law and one of fact, of which one is wholly within the province of the court, and the other within the province of the jury. The question of probable cause is often a composite one, since the dispute may be both as to the law and as to the facts, but this does not change the respective duties of court and jury, for the dispute as to the law is to be settled by the court; while the dispute as to the facts is to be settled by the jury.

In the case at bar, the theory of the trial court was radically wrong. The facts hypothetically assumed in the instructions were not only such as tended to establish probable cause, but were, if true, such as in law did constitute probable cause. It was, therefore, the duty of the court to instruct the jury, not that the facts assumed might be considered as tending to establish probable cause, but that they did in law constitute probable cause. Instead of leaving the question to the jury, as to whether the facts did or did not constitute probable cause, the court should have pronounced the law upon the facts, leaving to the jury only the settlement of the dispute as to the existence or non-existence of the facts.

Judgment reversed.

Filed Jan. 28, 1885.

No. 9061.

PARKS ET AL. v. KIMES ET AL.

PARTITION.—*Motion to Set Aside Report of Commissioners.*—*Presumption.*—*Practice.*—Where a motion is made to set aside the report of partition commissioners, on the ground that they set off to one person more than his share of land, but no showing is made of the truth of such ground, the presumption is that it is not true in fact, and the motion should be overruled.

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WILLS.—*Life-Estate.*—*Widow.*—Where a clause in a will provides, "I also direct that the following described land" (describing it) "to be and belong to my said wife so long as she may live," the widow takes a life-estate therein, notwithstanding a declaration in the first clause which indicates a purpose on the part of the testator to dispose of his entire estate, but which does not operate as such disposition, and notwithstanding, also, a statement in the last clause that the share of his real and personal estate given his wife should be in lieu of dower.

SAME.—*Partial Intestacy.*—*Reversion.*—*Stock of Descent.*—In such case, there being no disposition made of the estate in reversion, the same descended to the children of the testator, and if one of them died before the termination of the life-estate, his reversionary interest, if he still owned it, descended to his heirs.

DESCENT.—*Illegitimate Child.*—*Inheritance from Mother.*—Under section 2474, an illegitimate child, if its mother be dead, takes by inheritance from her any property or estate which she would, if living, have taken by gift, devise or descent from any other person.

From the Marshall Circuit Court.

J. L. Cook, for appellants.

J. S. Frazer and *W. D. Frazer*, for appellees.

BEST, C.—The appellees brought this action against the appellants to obtain partition of eighty acres of land in Marshall county, in this State.

Issues were formed, a trial had, a finding made for the appellees, an interlocutory judgment entered, and commissioners appointed to make partition of the land. The commissioners reported a division of the land, setting off nine acres to the appellee Penelope, after which the appellants made a motion for a new trial and a motion to set aside the report of the commissioners, both of which were overruled, and these rulings are assigned as error.

The ground of the motion to set aside the report was, that the commissioners set off to the appellee Penelope more than one-tenth in value of the land. No showing was made in support of the truth of this ground of objection, and in the absence of a showing the presumption is that it was not true in point of fact. The motion was, therefore, properly overruled. The motion for a new trial was based upon the

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ground that the finding was not sustained by the evidence, and was contrary to the law.

This motion raises the question as to the right of the appellees to any portion of the land. The appellee Penelope, an illegitimate child of Mary Parks, deceased, claims the land in dispute by descent from George W. Parks, Jr., a legitimate child of her mother, and John Kimes, her husband, joins her in the suit. This claim thus arises: James Parks owned a half section of land, a part of which is in dispute, and devised the same to Elizabeth Parks, his widow, for life, as the appellees claim. In 1839, James Parks died, leaving surviving him his widow and ten children, one of whom was George W. Parks, Sr., who died intestate, in February, 1853, leaving Mary Parks, his widow, and George W. Parks, Jr., a posthumous child, surviving him as his only heirs. In September, 1857, the appellee Penelope, an illegitimate child of Mary Parks, was born, and in 1859 her mother died, leaving surviving her as her only heirs, the appellee Penelope and George W. Parks, Jr. In 1865 George W. Parks died intestate, without wife, child, father, mother, brother or sister, other than the appellee Penelope, surviving him, and in 1873 Elizabeth Parks died. Neither George W. Parks, Sr., nor his son made any disposition of the land inherited from James Parks, and after the death of Elizabeth Parks this suit was brought to recover an undivided one-tenth of the land in the complaint described.

The appellants first insist that the will of James Parks, deceased, invested Elizabeth Parks with the fee of such land, and, therefore, the appellees are not entitled to any portion of it.

The particular clause of the will which disposes of this land is in these words: "I also direct that the following described land situate in Marshall county, Indiana, to wit: The south half of section twenty (20), range four (4) east, township thirty-three (33) north, to be and belong to my said wife so long as she may live." By a prior clause the testator had

bequeathed to his wife, absolutely, all his personal property not otherwise appropriated, and by subsequent clauses other tracts of land were devised to some of his children, and legacies in money were bequeathed to others. In the first clause of the will, after directions were given as to the funeral and burial, the testator adds: "And as to such worldly estate as it has pleased God to entrust me with, I dispose of the same in the following manner," and in the last clause he declares "that the share of my real and personal estate bequeathed to my said wife shall be in lieu of her dower, if she shall so elect."

The appellants insist that the declaration of the testator to dispose of his estate and the employment of such term in the beginning and conclusion of his will indicate very strongly a purpose upon his part to dispose of his entire estate, and that when the clause by which this land was devised is read in connection with these clauses in the will, the same should be construed as giving the fee to his widow. The declaration of the testator does indicate a purpose to dispose of his entire estate, but this declaration does not of itself operate as such disposition, and there is no clause in the will which does make any disposition of the estate in reversion in the half section of land devised by the terms of the will to the widow for life. The statement of the testator in the last clause of the will, that the share of his real and personal estate given his wife shall be in lieu of dower, is not inconsistent with the clause which in express terms devises her the land for life; indeed, it does not seem to us that there is room for construction. The language employed is definite and explicit, and there is nothing in the will that contravenes it other than the declared purpose of the testator to dispose of his estate, and the fact that the balance of it was disposed of absolutely. These considerations, however, do not warrant us in ignoring the phrase "so long as she may live," inserted, evidently, for the purpose of measuring the extent of her estate, and thus construing the will so as to pass the fee. We are not unmind-

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ful of the rule, that all the provisions of a will are to be read together, and that a construction which will result in partial intestacy is not to be adopted, etc., yet these rules in this case can not control an express provision which accurately defines and measures the extent of an estate devised. We, therefore, conclude that the widow took a life-estate only in such land. As no disposition was made of the estate in reversion, the same descended to the children of such testator. Section 2467, R. S. 1881; *Rusing v. Rusing*, 25 Ind. 63.

The appellants next insist that if the widow only took a life-estate in such land, still, as George W. Parks, Sr., died before the termination of his mother's estate, no part of the estate in reversion descended from him to his son George W. Parks, Jr., for the reason that George W. Parks, Sr., was not in possession, had not received rents, etc.; in other words, that he had no seizin of such estate, and, consequently, did not become the stock or *terminus* of an inheritance. This was the rule of the common law. 4 Kent Com. (12th ed.) p. 388. This rule, however, was founded on reasons peculiar to the feudal system, which required the conveyance of real estate to be accompanied by livery of seizin. In the transmission of title either by purchase or by descent, possession, actual by entry, or constructive by receiving rents, etc., was necessary, and without the one or the other no title vested, and, consequently, none descended. No such formality is required by our law, and, therefore, no such rule prevails with us. The title of real estate vests without such possession, and whoever dies the owner of an estate of inheritance becomes the stock of descent, and such estate descends to his heirs. Bing. Des., p. 50.

The estate in this case was not contingent, but vested, and consequently, when George W. Parks, Sr., died, the same descended to his son, from whom, at his death, it likewise descended. Bing. Des., p. 52.

The appellants also insist that if the land in dispute de-

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scended to George W. Parks, Jr., it did not descend from him to the appellee Penelope, because she was an illegitimate child of his mother and had no inheritable blood.

Our statute provides that if any intestate shall die without issue, or their descendants, alive, and without brothers or sisters, the estate shall go to the father and mother, or if either be dead to the survivor. Sections 2469 and 2470, R. S. 1881.

If the mother of George W. Parks, Jr., had survived him, she would have inherited from him the land in dispute, and the appellee Penelope claims that, under section 2474, R. S. 1881, she inherits through her mother precisely as her mother would have inherited had she survived her son. This section is in these words: "Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living, have taken by gift, devise, or descent from any other person." This section supports the appellee's claim. It substitutes the illegitimate child or children for the mother, and entitles such person or persons by inheritance to such property as the mother would have taken had she survived the decedent. The mother would have taken this property had she survived her son, and as she did not, the appellee, her illegitimate daughter, takes it through her by virtue of this section of the statute.

This disposes of all the questions discussed, and as no error appears in the record, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellants' costs.

Filed Jan. 28, 1885.

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No. 12,137.

DAVIS v. THE STATE.

CRIMINAL LAW.—Gaming.—Indictment.—Duplicity.—Motion to Quash.—An indictment under section 2079, R. S. 1881, charged that one D., on, etc., “was the keeper, manager and tenant occupying a certain building, * * and did then and there * * unlawfully and knowingly permit and suffer” certain persons “to be and remain, playing and gaming therein at the unlawful games of faro and poker, * * for money, * * and did then and there, on,” etc., “unlawfully keep said building to be used and occupied for gaming, contrary,” etc. On motion to quash,

Held, that the indictment is not bad for duplicity.

SAME.—In such case, where the offences charged were committed by the same person, at the same time, and as a part of the same transaction, and subject the offender to the same punishment, they may be joined conjunctively in one count as one offence.

From the Bartholomew Circuit Court.

M. D. Emig, for appellant.

F. T. Hord, Attorney General, *W. Dixon*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ZOLLARS, C. J.—Appellant contends that the indictment is bad for duplicity, and that, therefore, the court below erred in overruling the motion to quash. The prosecution is under section 2079, R. S. 1881, which provides that whoever keeps a building, etc., to be used or occupied for gaming, or knowingly permits the same to be used or occupied for gaming, or whoever, being the owner of any building, etc., rents the same to be used or occupied for gaming, shall be fined not more than five hundred nor less than ten dollars.

The indictment is in one count. That portion which charges and describes the offence is as follows: “That one John M. Davis, * * on the 1st day of January, A. D. 1883, and on divers other days and times between that day and the making of this presentment, was the keeper, manager, and tenant occupying a certain building, * * * * and did then and there, and on the said divers other days and times between that time and the making of this presentment, unlawfully and

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knowingly permit and suffer George Mitchell, * * * * and divers other persons, to the grand jury unknown, to be and remain, playing and gaming therein at the unlawful games of faro and poker, * * * for money, * * * and did then and there on said 1st day of January, A. D. 1883, and on said divers other times and days between said time and the making of this presentment, unlawfully keep said building to be used and occupied for gaming, contrary," etc.

The argument is that the above section of the statute defines three separate offences: *First*. The keeping of a building to be used, etc., for gaming; *Second*. Knowingly permitting the same to be used, etc., for gaming; and, *Third*. The renting of a building by the owner to be used for gaming. And that the indictment charges two of these offences in the same count, and is, therefore, double.

A case involving a statute similar to that involved here, came before this court in 1850. In that case, the indictment charged in the same count, that the defendant kept, and suffered his house to be used for gaming. It was insisted that the indictment was bad, because it charged two offences. It was held that it charged but one offence. *Dormer v. State*, 2 Ind. 308. In support of the ruling, the court cited the case of *State v. Slocum*, 8 Blackf. 315, where it was held that an indictment in one count, charging that the defendant maliciously, etc., destroyed and injured, and caused to be destroyed and injured, a certain mare, etc., was not objectionable for multifariousness or uncertainty, under a statute which provided that every person who should maliciously, etc., destroy, etc., or cause to be destroyed, etc., any property of another, should be guilty, etc.

In the case of *Sowle v. State*, 11 Ind. 492, a statute, in all essentials similar to the present statute, was involved. The prosecution was upon an information. After setting out the statute, the court said: "The first branch of the above section contemplates two offences—first, the keeping of a building, etc., for gambling; and second, suffering gambling in his

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building. * * * In the latter case," (*Dormer v. State, supra*) "a question was made as to duplicity—the indictment charging that the defendant *kept*, and suffered his house to be used, for gaming, etc. The Court held that the indictment was not double, which was undoubtedly a correct ruling, for the obvious reason that, if the defendant kept his house for gambling, it could neither add to, nor diminish from the offence that he suffered it to be used for the purpose for which it was kept. The latter was merged in the former." The indictment in the case of *Crawford v. State*, 33 Ind. 304, charged that the defendant unlawfully kept *and suffered* a certain building, etc., to be used for gaming, and then and there unlawfully suffered Michael Beck, James A. Stretch, etc., to play at a certain game, commonly called billiards, for money, etc. It will be observed that this indictment was very similar to the one before us, except in the order of statement. It was claimed there, that the indictment was bad for duplicity. The court said: "This question has been settled in this court against the appellant," and cited the cases of *Dormer v. State, supra*, and *State v. Slocum, supra*. The same question, under the same statute, and upon an indictment in all respects the same as that before us, except in the order of statement, came before the court again in the case of *Padgett v. State*, 68 Ind. 46, and upon the authority of the case of *Crawford v. State, supra*, the indictment was held sufficient. In the later case of *State v. Pancake*, 74 Ind. 15, the indictment charged that the defendant kept a house for gaming, by permitting certain named persons to gamble therein for money. After citing what was said in the case of *Sowle v. State, supra*, about the statute contemplating two offences, viz., the keeping of a building for gaming, and permitting gambling therein, it was held that the indictment sufficiently charged the keeping of the building for gambling, without aid from the averments which followed it, and that the portion in relation to the character of the games

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played, and the persons who played them, might be regarded as surplusage, and would not render the indictment bad.

The indictment in that case is not so similar to the one before us as the indictments in the other cases cited, for the reason that the word "*by*," indicates that what followed it was in support of the charge that the house was kept for gambling. These are the only cases that we have found in our search, in which the question here involved has been adjudicated by this court. In all of them it is conceded, and in some of them held, that the section of the statute defines the offences of keeping a house for gaming, renting a house for gaming, and permitting gaming in such a house, as separate offences, and in all of them it was held that an indictment, charging in one count two of the offences, is not bad for duplicity. None of them give a very satisfactory reason for the holding, unless, perhaps, the case of *Sowle v. State*, *supra*, and the case of *State v. Pancake*, *supra*, which, as we have seen, involved a differently framed indictment.

The purpose of the statute is to suppress gambling houses. If a person keeps a house to be used for gaming, he violates the statute, and may be convicted. If a person knowingly permits his house to be occupied or used for gaming, he, that far, makes it a gambling house, violates the statute, and may be convicted. In this sense, the offences are separate, and may be separately prosecuted. And yet, in another sense, the offences constitute the one offence of violating the statute against gambling houses. And in this sense, as was said in the case of *Sowle v. State*, *supra*, the offence of permitting the gambling is merged in the offence of keeping a gambling house. .

Mr. Bishop, in his work on Criminal Procedure, vol. 1, at section 436, in speaking of statutes framed like that under consideration, says: "It is common for a statute to declare, that, if a person does this, or this, or this, he shall be punished in a way pointed out. Now, if, in a single transaction, he does

all the things, he violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore, an indictment upon a statute of this kind may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." In support of this the author cites English cases, and cases by the Supreme Courts of Massachusetts, Missouri, Iowa, New Hampshire, Texas, West Virginia, Georgia, Maine, Wisconsin, Alabama, and some of the United States Circuit Courts.

In speaking of an indictment under statutes in relation to gaming houses, the same author, at section 493, vol. 2, of the same work, says: "Nor is it double or uncertain, though it alleges that the defendant kept the house on a day named, and allowed gaming in it then and on divers days and times before and after."

In the case of *Clifford v. State*, 29 Wis. 327, it was held that when a statute makes it a crime to do any one of several things mentioned *disjunctively*, all of which are punished alike, it is a general rule that the whole may be charged *conjunctively* in a single count as a single offence.

In the case of *Byrne v. State*, 12 Wis. 577, it was said: "The rule is well settled that, where a statute makes either of two or more distinct acts connected with the same general offence and subject to the same measure and kind of punishment, indictable separately as distinct crimes when each shall have been committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count, as constituting altogether but one offence. In such cases, the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law; and proof of either of the acts mentioned in the statute and set forth in the indictment will sustain a conviction. * * *

Davis v. The State.

There can be no doubt that the receiving and sanctioning the reception of a vote, under the circumstances stated in the statute, are distinct offences, and when committed separately may be indicted as such, but the indictment is not double or uncertain because both are joined in the same count for the reason above stated." See, also, *State v. Cooster*, 10 Iowa, 453; *State v. Myers*, 10 Iowa, 448. And, to the same effect as the Wisconsin cases, *State v. Prescott*, 33 N. H. 212, *Mackey v. State*, 3 Ohio St. 362, *State v. Fletcher*, 18 Mo. 425, *Commonwealth v. Twitchell*, 4 Cush. 74.

Francisco v. State, 4 Zab. 30. In this case it was said: "Another error alleged is, that the indictment charges several misdemeanors in a single count, to wit, an assault and battery and false imprisonment. There is nothing in this. The assault, the battery, the false imprisonment, though in themselves separately considered they are distinct offences, yet collectively they constitute but one offence—the seizure and forcible detention of a person illegally and against his will is technically such an offence."

Our own cases are in accord with the general doctrine of the above authorities. *State v. Kuns*, 5 Blackf. 314; *Durham v. State*, 1 Blackf. 33; *State v. Hutzell*, 53 Ind. 160.

The case before us falls clearly within the doctrine of the above authorities, which, in our judgment, is a reasonable doctrine. Here the indictment charges those things which are in violation of the section of the statute against gambling houses; they were committed by the same person, and at the same time, are a part of one transaction, and subject the offender to the same punishment, and are, therefore, properly joined in the same count.

Appellant's reliance is upon the case of *Knopf v. State*, 84 Ind. 316. All that was held in that case is that separate and distinct offences, created by separate and distinct sections of the statute, and separate statutes, can not be joined in the same count of an indictment, and that such an indictment will be quashed for duplicity. We adhere to the doctrine of

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that case, but it is not the case before us. The two cases are clearly and readily distinguishable. We conclude that the court below did not err in overruling the motion to quash the indictment, and, therefore, affirm the judgment, with costs.

Filed Feb. 13, 1885.

 No. 10,778.

CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS
RAILWAY COMPANY v. WYNANT.

NEGLIGENCE.—*Sufficiency of Complaint.*—*Demurrer.*—*Motion.*—In an action to recover damages for personal injuries caused, as alleged, by the negligence of the defendant, a general charge of such negligence is sufficient to withstand a demurrer to the complaint, for the want of facts; and, in general, objections to the sufficiency of a complaint, on the ground that its allegations in regard to negligence are not full, clear or explicit, can not be reached by a demurrer for the want of facts, but only by a motion to make the complaint, or the particular allegation, more certain and specific.

PRACTICE.—*Allegations and Evidence.*—*Material Variance.*—*New Trial.*—*Error.*—The plaintiff must recover upon and according to the allegations of his complaint, or not at all; and where he obtains a verdict upon evidence which makes or tends to make a case materially different from the case stated in his complaint, it is error to overrule the defendant's motion for a new trial.

From the Madison Circuit Court.

H. H. Poppleton, M. S. Robinson, J. W. Lovett, A. C. Harris and W. H. Calkins, for appellant.

H. D. Thompson and T. B. Orr, for appellee.

Howk, J.—The first error of which the appellant complains here is the overruling of its demurrer to each paragraph of appellee's complaint. The complaint contained two paragraphs. In the first paragraph, the appellee alleged that the appellant was the owner of, and for ten years last past had been operating, a railroad from the city of Cleveland, in the State of Ohio, to the city of Indianapolis, in this State, through the county of Madison, and that its railroad passed

100 160
128 206
139 476

100 160
134 237
134 689
136 194

100 160
139 468

100 160
143 666

100 160
146 566
147 168

100 160
148 193
152 466

100 160
155 40
156 226

100 160
1166 120

100 160
166 149

167 89
167 209
167 340

100 160
171 481

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over and across the highway leading from the city of Anderson to the town of Pendleton, both in Madison county; that, in 1867, the appellant constructed a branch railroad, leading from the main line of its road to a gravel bank in said county, of the length of about one mile, and had owned and operated such branch railroad continuously since its construction, which branch crossed the aforesaid highway in Madison county; that, on March 22d, 1882, the appellant placed about forty box and flat cars on the track of its branch railroad, at and near its crossing of the above described highway, one of which box cars the appellant then placed upon and partially across such highway, which box car as so placed by appellant extended twenty-four feet upon the highway, and to the edge of the part of the highway then used by the public as their route of travel, and then and there unlawfully permitted such car to obstruct the highway and the travel thereon; that, on the day last named, the appellee was going from her home in said county to the city of Anderson, in a two-horse spring-wagon drawn by two quiet and gentle horses; that when she came with said team of horses to the crossing of the highway by such branch railroad, the appellant by carelessly, negligently and unlawfully permitting said box car, in its then condition, to remain upon such highway as aforesaid, caused the said team of horses and each of them to become frightened and unmanageable, and to run away, and in their fright to overturn the wagon in which appellee was riding, and threw her out of the wagon, thereby breaking her arm and greatly injuring her body, causing her great bodily and mental pain and suffering, etc., all of which was done and caused by the appellant, without appellee's fault or negligence, to her damage in the sum of \$5,000, for which she demands judgment, etc.

In the second paragraph of her complaint, the appellee alleged that, on March 22d, 1882, the appellant being the owner of a railroad and the cars and locomotives proper for

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operating the same, and then engaged in operating the same, the appellee then going along one of the public highways of Madison county, in a two-horse spring-wagon drawn by two quiet and safe horses; that by reason of the negligence and carelessness of the appellant, unlawfully permitting an empty box car to remain on the track of its railroad, and to unlawfully remain in and upon such highway where appellee was compelled to travel, and by reason of such box car being so in the highway as above stated and "in its then condition," the said horses became frightened and ran away, overturning the wagon and throwing appellee upon the ground and against a fence, by reason of which her arm was broken, and she was otherwise greatly injured and caused to suffer great bodily and mental pain, and to entirely lose the use of her arm; all of which was caused by the carelessness and negligence of appellant, without any fault or negligence of the appellee, by reason of which she sustained damages in the sum of \$5,000, for which sum she demanded judgment, etc.

Appellant's counsel earnestly insist, in argument, that the facts stated in each of these paragraphs of complaint are insufficient to constitute a cause of action. It must be confessed that the facts of the case are not very fully or accurately stated in either paragraph, and, especially, in the second paragraph of the complaint. But it must be borne in mind, in considering this question, that all the facts well pleaded, whether fully or accurately stated or not, by force and for the purposes of the demurrer, are admitted to be true precisely as the same are pleaded. Thus considering the objections urged by appellant's counsel to appellee's complaint, in the case in hand, we have no difficulty in reaching the conclusion that none of them are well taken, as to either paragraph of the complaint, by the demurrers thereto for the want of sufficient facts. The argument of counsel is chiefly devoted to the consideration of the alleged insufficiency of the facts stated in the second paragraph of complaint to constitute a cause of action. Counsel say of this paragraph, that its allegations

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negative the idea that the box car was placed in and upon the highway by the appellant. We find no such negation in the paragraph. It simply fails to allege how or by whom the car was placed there, and it can hardly be said that this silence of the paragraph upon the subject either affirms or negatives the idea that the car was placed there by the appellant. This paragraph substantially charges that the appellant unlawfully permitted an empty box car, on the track of its railroad, to unlawfully remain in and upon the highway where appellee was compelled to travel, etc. That is, without any statement as to how or by whom the car was placed there, it is charged that the appellant unlawfully permitted it to remain in and upon the highway. In section 2170, R. S. 1881, in force since September 19th, 1881, it is made a criminal offence punishable by fine to permit or suffer a railroad train, "used for carrying freight," to remain standing across any public highway, street or alley. We know that box cars are ordinarily used for carrying freight, and when it was charged that appellant permitted an empty box car to unlawfully remain in and upon the public highway, the appellant was thereby charged with the violation of a positive statute prohibiting the wrongful obstruction of a public highway. Section 1964, R. S. 1881. The act of the appellant in permitting the empty box car to remain in and upon the public highway was an unlawful act, and it was charged in effect that this act was occasioned by the appellant's negligence.

It is settled by the decisions of this court, that a general allegation of negligence is sufficient to withstand a demurrer to the complaint for the want of facts; and that, under such allegation, the facts constituting negligence may be given in evidence. *Indianapolis, etc., R. R. Co. v. Keeley*, 23 Ind. 133; *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471; *Pittsburgh, etc., R. R. Co. v. Nelson*, 51 Ind. 150. So, too, it has been repeatedly held by this court, where it was claimed that the allegations of the complaint in regard to negligence were not suffi-

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ciently full, clear and explicit, that the objection could not be reached by a demurrer for the want of facts, but only by a motion to make the complaint, or the particular allegation thereof, more specific. *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Hawley v. Williams*, 90 Ind. 160; *Pennsylvania Co. v. Dean*, 92 Ind. 459.

Appellant's counsel further insist that the second paragraph of complaint is bad on demurrer, because "it is not even charged therein that the horses took fright at the car." We think, however, that the paragraph is not fairly open to this objection. The allegation of the paragraph, on this point, is that by reason of the box car being so in the highway as above stated, and "in its then condition," the horses became frightened, etc. This averment is somewhat vague and uncertain, it is true; but the remedy for such a defect in pleading, as we have already said, is by motion, and not by demurrer. The phrase, "in its then condition," is a meaningless expression and adds nothing to the force of the averment; but, rejecting this expression as mere surplusage, we think the allegation shows with certainty, sufficient on demurrer, that the pleader intended to and does charge that the horses took fright at the car.

A number of other objections are urged by appellant's counsel to the sufficiency of each of the paragraphs of appellee's complaint, but, as to these objections, it is enough for us to say that none of them, in our opinion, are properly presented for our decision by the errors assigned upon the overruling of the demurrers to the complaint. We need not, therefore, and do not extend this opinion in the separate consideration of these objections. While we can not commend either of the paragraphs of complaint as a model of good pleading, yet we think that each of them stated facts sufficient to withstand the appellant's demurrers. Each of them stated, substantially, that by the appellant's negligence in permitting an empty box car to unlawfully remain in and upon the public highway mentioned, the appellee's team of horses

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became frightened at such box car, ran away, etc. In the first paragraph it was charged, in addition to what we have last stated, that the appellant unlawfully *placed* the box car in and upon the highway, and this was the material difference between the two paragraphs.

Appellant's counsel very earnestly insist that the court erred in overruling the motion for a new trial, upon the ground that the verdict of the jury was not sustained by sufficient evidence. We think this point is well taken. Of course, evidence tending to prove the appellant's negligence in relation to the box car, as charged in either paragraph of the complaint, is not alone sufficient to entitle the appellee to recover damages for the injuries she sustained. It must be shown also by the evidence, that the appellee's injuries were occasioned not only by the appellant's negligence as the proximate cause, without contributory negligence on her part, but substantially in the manner alleged in the complaint. It was charged in each paragraph of complaint, that the appellee's team of horses became frightened at the empty box car, negligently and unlawfully suffered by appellant to remain in and upon the public highway, and ran away, etc. There is no evidence in the record tending to prove that appellee's team became frightened at the car; on the contrary, we think the evidence utterly refutes the charge that the team took fright at the car. It was shown by the evidence that the horses were quiet and gentle, and so much accustomed to cars and the noise of railroad trains that they would stand quietly within a few feet of a swiftly running train. The appellee and her husband were together at the time the team ran away, and were witnesses on the trial of this cause. Neither of them testified, nor did any other witness, that the horses became frightened at the car. Appellee testified: "The horses got scared at the noise that was made. I could not tell what did it, but it was the noise that scared the horses." When asked if she could describe the noise, her answer was: "No, sir; it was a kind of racket, enough to scare horses." Her husband

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testified to the effect that the horses became frightened at a noise in a car that was on the railroad out in the public highway. There is no other evidence in the record in conflict with that of the appellee and her husband. We are of opinion, therefore, that there is an absolute failure of evidence to sustain the case made by the material allegations of the complaint.

It has often been held by this court that the plaintiff must recover *secundum allegata et probata*, or not at all. In *Boardman v. Griffin*, 52 Ind. 101, the court said: "It would be folly to require the plaintiff to state his cause of action, and the defendant to disclose his grounds of defence, if, on the trial, either or both might abandon such grounds and recover upon others which are substantially different from those alleged." To the same effect, substantially, are the following more recent cases: *Terry v. Shively*, 64 Ind. 106; *Perry v. Barnett*, 65 Ind. 522; *Thomas v. Dale*, 86 Ind. 435.

A new trial ought to have been granted the appellant in the case in hand, because the evidence did not tend even to sustain the verdict on every material point.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Filed Jan. 29, 1885. Petition for a rehearing overruled March 17, 1885.

No. 11,988.

MILES, TREASURER, v. RAY.

RAILROAD.—*Public Aid.*—*Levy of Tax Exceeding Two per Cent. in Two Years.*
—*Shrinkage in Value of Taxables.*—*Injunction.*—*Tender.*—A township voted an appropriation of \$30,000 in aid of a railroad, that sum being less than two per cent. of the taxables for the preceding year, 1879. In 1880, the county board levied a tax of one per cent. on such taxables, but, owing to shrinkage in the value thereof, this levy produced less than one-half of the appropriation. In 1881, the board levied the entire remainder of the appropriation, which required 1 $\frac{4}{10}$ per cent.

100	166
166	518
100	166
135	543
100	166
144	275
100	166
150	423
100	166
163	91
100	166
166	175
166	195

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Held, that under sections 4056 and 4057, R. S. 1881, the board had no power to order a levy exceeding two per cent. in any one period of two years, and that the collection of the excess could be enjoined by paying or tendering the part of the tax legally due.

Held, also, that if a levy of two per cent. in two years would not have produced the required amount, by reason of the shrinkage, an additional levy for the deficiency might have been ordered in the succeeding year.

From the Fountain Circuit Court.

L. Nebeker and H. H. Dochterman, for appellant.

G. D. Hurley and B. Crane, for appellee.

BICKNELL, C. C.—The appellee, a resident freeholder and taxpayer of Troy township, in Fountain county, Indiana, brought this suit against the treasurer of said county to prevent by injunction the collection of a tax alleged to be illegal.

The township had voted an appropriation of \$30,000 in aid of a railroad to be constructed through the township. This amount was less than two per cent. of the amount of the taxables of the township for the year preceding, which was 1879. In June, 1880, the county board ordered that the amount voted be donated to the railroad company, and also ordered a levy of one per cent. on the taxables of the township for the current year, 1880; this levy was duly collected; it produced \$12,286.45, the taxables of 1880 being \$1,228,645. Owing to a shrinkage in the taxables, the levy of one per cent. did not produce one-half of the appropriation voted, but left \$17,713.55 to be subsequently raised.

The taxables of said township for 1881 amounted to \$1,-249,477, and the county board, at its June term, 1881, instead of levying another one per cent. thereof, which would have produced \$12,494.77, ordered a levy of the entire remainder of the \$30,000 voted, viz., \$17,713.55, which sum was regularly assessed upon the taxables of said township for 1881, and was placed upon the duplicate.

The plaintiff was assessed for 1881, upon \$8,315, which was all the taxable property he had. It required a levy of $1\frac{42}{100}$ per cent. to raise said sum of \$17,713.55, and such a

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levy was made. The amount of it upon the plaintiff's taxable property was \$118.57. The plaintiff, being ignorant of said illegality, paid the first half of said taxes, viz., \$59.08, and afterwards, before suit brought, tendered to said treasurer \$30.16 in payment of the remainder of the amount of \$1 on each \$100 worth of his taxables, which the treasurer refused to receive, and which was paid into court for his use. The plaintiff refused to pay the $\frac{42}{100}$ of one per cent., amounting to \$34.92, and this amount is on the duplicate in the hands of said treasurer who is threatening to collect it.

Said railroad has never been constructed through said township; no work has been done on the last two miles of the proposed line in said township; no iron has been laid there and no train of cars has passed through the township. But, under the orders aforesaid of the county board, there has been already collected in said township the sum of \$30,125.75, and said county board has paid said railroad company \$31,085.51.

The complaint avers the facts as aforesaid, and prays that said illegal tax, to wit, the excess above one per cent. of the taxables be declared null and void, and that said treasurer be perpetually enjoined from collecting the same.

The treasurer filed a demurrer to the complaint for want of facts sufficient; the demurrer was overruled; the defendant refused to answer; judgment was rendered for the plaintiff on the demurrer, and the defendant was enjoined pursuant to the prayer of the complaint. He appealed. He assigns as errors:

1. Overruling the demurrer to the complaint.
2. That the complaint does not state facts sufficient.

The following are the statutes by which this case is governed: R. S. 1881, section 4056. "If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at its ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half of the amount specified in said petition, but not exceeding one per centum upon the real and personal property in the county or township, as the case

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may be, liable to taxation for State and county purposes.
 * * * And if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said board of county commissioners at the June session of the following year."

Section 4057. "No township shall be authorized by the provisions of this act to appropriate to railroad purposes, or to raise by taxation for such purpose, to exceed two per centum upon the taxables of such township, as said taxables shall appear upon the tax-duplicate of the county, in any one period of two years."

The power to subject property to taxation in aid of railroad companies can be exercised only in strict conformity to, and by a rigid compliance with the letter and spirit of, the act conferring the authority. The act should be strictly construed in favor of the rights of property. *People v. Smith*, 45 N. Y. 772; *Garrigus v. Board, etc.*, 39 Ind. 66; *Bronenberg v. Board, etc.*, 41 Ind. 502; *Finney v. Lamb*, 54 Ind. 1; *State, ex rel., v. Board, etc.*, 92 Ind. 133.

The demurrer admitting the facts stated in the complaint, it appears that the county board, by ordering a levy of more than two per centum upon the taxables as they appeared upon the tax-duplicate in one period of two years, failed to obey sections 4056 and 4057, *supra*.

The tax levied in 1880, being limited to one per cent. of the taxables of the preceding year, was right, but when, by reason of the shrinkage of the taxables in 1880, one per cent. thereof did not produce one-half of the money appropriated, the board in 1881 had no right to order a levy of the entire remainder of the appropriation, because that would require a tax of $1\frac{42}{100}$ per centum of the taxables, which, added to the 1 per centum of the previous year, would make $2\frac{42}{100}$ per centum in one period of two years, and this is exactly what the law forbids. *Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427; *Brokaw v. Board, etc.*, 73 Ind. 543; *Gavin v. Board, etc.*, 81 Ind. 480.

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The county board in 1881 ought to have ordered a tax of one per cent., and if that proved to be insufficient, owing to a shrinkage of the taxables, the county board in the succeeding year might have ordered an additional levy for the deficiency. This was, in effect, decided in *Board, etc., v. State, ex rel.*, 86 Ind. 8. This court there said: "Not more than two per centum of the taxable property of a township, as estimated by the tax-duplicate of the preceding year, can be appropriated at any one time to aid in the construction of a railroad; nor can more than two per cent. of such taxable property be levied upon the property of the township within a period of two years." But when an appropriation not exceeding two per cent. has been lawfully made, it becomes a binding obligation upon the township, from which it is not discharged by a subsequent destruction or shrinkage in value of some of its taxable property. This construction secures to the company ultimately the full amount of its appropriation, and at the same time protects the taxpayers from a levy of more than two per cent. in any period of two years.

The claim of the appellant that where the first levy of one per cent. fails to produce one-half the amount appropriated, the county board, in the following year, may, instead of levying another one per cent., levy enough to produce the entire deficiency without regard to percentage of taxables, and notwithstanding that such levy and the preceding levy of one per cent. will together make more than two per cent., can not be sustained.

The treasurer was undertaking to collect a tax which was in part legal and in part illegal. The complaint shows that the assessment was placed upon the duplicate, that the duplicate was in the treasurer's hands, and that he was threatening to collect the entire tax. An injunction is the proper remedy in such a case. *Pugh v. Irish*, 43 Ind. 415.

Where a part of the tax is valid, and another part void, the valid part must be paid or tendered before equitable relief can be granted. *City of Delphi v. Bowen*, 61 Ind. 29,

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and cases there cited. The complaint here shows that the plaintiff has paid or tendered all the valid part of the tax, and has brought the amount tendered into court for the use of the defendant. He is therefore entitled to an injunction as to the residue.

There was no error in overruling the demurrer to the complaint. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Jan. 28, 1885.

No. 10,696.

BARNETT v. THE STATE.

100	171
140	363
100	171
147	10
100	171
149	406

CRIMINAL LAW.—*Murder.*—*Manslaughter.*—*Indictment.*—Under an indictment charging murder in the first degree, there may be a conviction for manslaughter if the evidence warrant it.

SAME.—*Self-Defence.*—Life may be taken in the reasonable and lawful exercise of the right of self-defence. This right must be exercised honestly; a party can not provoke an assault in order that he may have an apparent excuse for the killing.

SAME.—*Instructions.*—An instruction, unobjectionable as far as it goes, will not be condemned, as an available error. If, in such case, a party wishes further instructions he must ask for them.

SAME.—A party will not be heard to complain of an instruction as erroneous which is more favorable to him than he has a right to ask.

SAME.—*Province of Jury.*—An instruction to the jury, that they are the judges of the law, that the court's instructions are not to bind their consciences, but merely to aid and assist them in a true apprehension of the law, and its proper application to the evidence, is not erroneous.

SAME.—*Harmless Error.*—The refusal of instructions, the substance of which is embodied in charges given, is not an available error.

From the Gibson Circuit Court.

J. E. McCullough, J. B. Gamble, J. W. Gordon, R. N. Lamb and S. M. Shepard, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

Barnett v. The State.

ZOLLARS, C. J.—On the 10th day of February, 1881, appellant shot and killed one James Ellis. He was tried upon an indictment charging him with murder in the first degree, convicted of voluntary manslaughter, and sentenced to the State's prison for ten years. There is evidence in the record showing, or tending very strongly to show, the following facts: Appellant is a strong, vigorous man of about twenty-eight years of age, and weighs about one hundred and eighty-five pounds. The deceased weighed about one hundred and thirty-two pounds, and was about fifty years of age. These persons had some difficulty, and a personal encounter at the October election in 1880, in which appellant struck and knocked the deceased from the sidewalk. There is some testimony that subsequent to this difficulty, appellant on different occasions said that he intended to kill some one, but there is nothing to show, with anything like certainty, that he had reference to the deceased. One witness, however, testified that he had a conversation with appellant a short time before the homicide, in which appellant, in referring to the difficulty with Ellis at the election, said that if he had had his "pop" with him, he would have killed him—that he had his "pop" now. There is evidence also, that subsequent to this difficulty appellant said that if the deceased came in his way, he would "pop" him again, and that the deceased said that he had had a difficulty with appellant that should at some time be settled. On the day of the homicide, the parties met in a saloon in Hazleton, Gibson county. At first there was no manifestations of ill feeling on the part of either. They indulged in drinking, treating each other and those present. Appellant knocked a pipe from the mouth of the deceased, apparently in a playful manner and without ill feeling. Subsequent to this, the deceased tripped appellant so that he fell. Upon getting up, the deceased brushed the dust from his clothes, saying that it was all in fun. Appellant responded that it was on the bills, and must be played. There is evidence that prior to this, the deceased said to appellant that

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he, appellant, had broken his jaw once, but could not do it again, and that subsequently there was further drinking. Still subsequent to this, appellant, for some cause, not very clearly shown by the evidence, took off his coat and vest, laid them upon the counter, and his revolver upon them; said that he could whip the deceased upon less ground than he stood upon, and insisted that they should go from the room and fight it out. At this time, appellant was angry, and cursing and swearing in a violent manner. The deceased did not seem to be angry, and said that appellant was a larger man than he, and that he did not want to fight. After appellant was induced to put his clothes on, he continued cursing the deceased, and finally struck him, as some of the witnesses stated. He continued cursing until the deceased said: "Cal, you ought not to serve me that way, you are a bigger man than I am; I am not able to fight you; Cal don't curse me, I will take it from no man," etc. Shortly after this, the deceased went to a back room, returned with a heavy quart bottle filled with beer and struck appellant with it upon the head, breaking the bottle and inflicting a wound. At this time, one of the witnesses was standing between appellant and the deceased. If it was his purpose to keep them separated, he did not succeed, for immediately after the blow, appellant seized Ellis and fired his revolver. After the shot, the revolver was knocked from his hand by a bystander. A severe fight followed. Ellis died from the effects of the shot in a few minutes after they were separated. Appellant was arrested on the same day of the homicide, and, when asked why he shot Ellis, said: "Damn him, I ought to have shot him ten years ago."

It must be clear that we can not reverse the judgment on the weight of the evidence. Indeed, had the conviction been for a higher grade of crime, with the corresponding severer penalty, we could not reverse the judgment upon the evidence in the record. There is scarcely plausible ground here, in our judgment, for a claim that the shooting was in self-

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defence. From the first, appellant was the aggressor. By abuse and assault, he goaded the deceased into an assault upon him. The evidence is conclusive that the deceased had no weapon except the beer bottle. When that was broken, his weapon was gone. The blow with it inflicted a wound upon appellant, but in no material way disabled him. He was a young, stalwart man. The deceased was confessedly his inferior in physical strength. When his weapon was broken, without serious injury to appellant, the latter must have known, and without doubt did know, that he was in no danger of any serious injury. The shooting on his part is utterly without any kind of justification. That the jury in their leniency acquitted him of malice, is no reason at all why we should extend the leniency to an absolute acquittal, or shut our eyes to the whole evidence in the case, when asked to review the case upon the evidence.

Many objections are urged to the instructions given by the court, and to the action of the court in refusing those asked by appellant. To these we give our attention in the order discussed.

In the first and second instructions, the court properly charged the jury as to the crimes of murder in the first and second degree, and manslaughter, and also as to the presumption of innocence and the rule as to reasonable doubt.

After having charged the jury in the third instruction, that the State must prove beyond a reasonable doubt that the killing was unlawful, etc., the instruction closed as follows: "This involves an inquiry into the rules of law in relation to the right of self-defence, the manner of its exercise, and the testimony in the case tending to prove or disprove such a state of facts existing at the time of the alleged killing as authorized a right to resort to the use of a pistol by the defendant in the alleged defence of his person." As we understand counsel, the objections to this portion of the instruction are, that it tended to confuse and mislead the jury, and that from it the jury would understand that the facts proven must be

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such as to authorize the use of the pistol without reference to appearances, or the belief on the part of appellant that he was in danger of great bodily harm. We think that neither of these objections is tenable. This portion of the instruction did not attempt to lay down rules upon the subject of self-defence, but simply directed the minds of the jury to matters about which they should make inquiry.

The objection urged to the fourth instruction is that it is "scarcely relevant." We think it was, and that it was so favorable to appellant that he has no ground to complain of it. The substance of it was that life may be taken in the reasonable and lawful exercise of the right of self-defence.

The first portion of the fifth instruction was that where a person being without fault, and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if in the reasonable exercise of his right of self-defence his assailant is killed, he is excusable.

No objection is urged against this portion of the instruction. After charging the jury in the subsequent portion of the instruction, that a party is not justifiable in resorting to force on his mere passion, or fear, and that in any case the force used must be such as under the circumstances appears reasonably necessary to prevent the anticipated injury, the instruction closes as follows: "If, however, the assault be of such a character, and so imminent as to warrant the party assailed, considering his situation and the apparent surroundings, reasonably to believe that he is in danger of loss of life, or great bodily harm, and he does so believe, he may use, without delay, such means as may be at hand and reasonably necessary to repel the apprehended attack, and if death follows as the result thereof, he will not be guilty of an unlawful homicide; and if in such case the danger appear to be real, and is believed by him to be so, the fact, if such be the case, that the danger was not real, but only apparent, and that in fact he was in no danger, such fact would not render him guilty."

There are some portions of the instruction that, when taken from their connection and subjected to a critical examination, are apparently not in entire harmony with that quoted. These the learned counsel have singled out and made a violent assault upon them. As was once said by this court, it is good military tactics to divide the enemy's forces and defeat and overthrow the separate fractions, as a means of defeating and overthrowing the whole, but it is not proper to adopt such tactics in the examination of an instruction. As said in the case of *McDermott v. State*, 89 Ind. 187, "The instruction should not be thus dissected and separated. It must be considered as a whole. If an instruction may be thus separated into fractional parts, so that one portion may not limit and qualify, or extend and explain another portion, it will be difficult, if not impossible, to form an instruction that will stand such an examination and criticism. In thus separating into parts, the sense may be twisted and tortured so that the most correct may appear to be the most faulty instruction." See, also, *Nicoles v. Calvert*, 96 Ind. 316; *Wright v. Fansler*, 90 Ind. 492; *Story v. State*, 99 Ind. 413. The portion of the instruction last above set out is really a summing up of the instruction, and states the rule favorably to appellant.

In the sixth instruction, the court charged the jury that the right of self-defence is allowed to the citizen as a shield, and not as a sword, and that in the exercise of the right a party must act honestly; that a person assaulted may exercise a reasonable degree of force to repel the attack, but must not provoke an attack in order that he may have an apparent excuse for killing the adversary. In a figurative sense, the right of self-defence is a shield. Its purpose is to shield and protect one's person from death or great bodily harm. In its exercise, the assailant may be killed, yet the killing is to shield and protect one's own person. The statement by the court could in no way improperly influence the jury against appellant. There was evidence tending to show that appellant provoked the assault by the deceased. It was to this feature

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of the case that the court directed the instruction. As preliminary to the statement of the rule in such cases, it was said that the right of self-defence is a shield, and not a sword, and that the party assaulted may use a reasonable degree of force to repel the attack. As to what might, in any case, be the use of a reasonable degree of force, was not particularly stated, because that was not the purpose of the instruction. Clearly, it can not be contended that a party may use an unreasonable degree of force. As to what may be reasonable will depend upon the circumstances of each case. It was not necessary in this instruction for the court to go into that question in detail, because, as we have said, the purpose of the instruction was to guide the jury upon another feature of the case. It is proper to say here that in another charge the court instructed specifically and properly upon this point. We can discover nothing in the instruction that is erroneous, or that might in any possible way mislead the jury.

The eighth instruction was a summing up and statement of the theories of the State and the defence. The only complaint is that the instruction closed without the statement of any rules of law as applicable to the theory upon either side, and the evidence claimed to be in support thereof. An instruction of the nature of this, unobjectionable as far as it goes, will not be condemned, as an available error, because it goes no further. If appellant wished the law declared upon the statements made by the court, it was his duty to have submitted and asked such instructions as he wished to have given. *Powers v. State*, 87 Ind. 144; *Simpkins v. Smith*, 94 Ind. 470; *Carver v. Carver*, 97 Ind. 497.

No objection is made to the ninth instruction, except that it might tend to mislead the jury by confusing them. We can not extend this opinion to set out all of the many instructions, and discuss at length the many objections urged against them. We have read the ninth and find nothing in it to confuse or mislead the jury. The instruction was favorable to appellant.

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The eleventh instruction was upon the subject of declarations made by appellant before the homicide. If the State, instead of appellant, were complaining, the complaint would challenge careful attention. This instruction, doubtless, went far to weaken the evidence of such declarations, and probably contributed to the acquittal of appellant upon the charge of malice. Very clearly, there is nothing here of which he can, with reason, complain.

Of the objections to the twelfth and thirteenth instructions, it is sufficient to say that they are unsubstantial.

The fourteenth instruction was mainly upon the question of self-defence. After a pretty full statement upon the subject, the jury were instructed, in substance, that if appellant provoked an assault by the deceased as an excuse for the shooting, he was guilty of an unlawful killing. The jury were further charged in this instruction, substantially, that although there might have been premeditated malice, yet, if the shooting followed an assault by the deceased, it should be made clearly to appear that the killing was prompted by the malice, in order to repel the conclusion that it was due to the assault. No fault can be found with this by appellant. Whether the State might properly complain, we do not decide. It amounted to saying to the jury, that the killing was presumed to have been in self-defence. These portions of the instruction are objected to as foreign to the subject upon which the court was charging. We think not. In stating the general rules of self-defence, it was proper to guard them against a misapplication by the jury, and yet give to the defendant the full benefit of them. It may be that the instruction is not in the most appropriate form and language, but we are satisfied that there was nothing in it prejudicial to appellant. The verdict of the jury, convicting appellant of voluntary manslaughter only, is proof of this.

The substance of the sixteenth instruction was that under the indictment, charging murder in the first degree, there might be a conviction for manslaughter, if the evidence war-

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ranted it. This is clearly the law. *Powers v. State, supra*; *Carrick v. State*, 18 Ind. 409; *Dukes v. State*, 11 Ind. 557; *Moon v. State*, 3 Ind. 438.

The seventeenth instruction defines, again, murder in the first, and second degree, and voluntary manslaughter. To that portion of the instruction which relates to premeditated malice, we see no valid objection. It is sufficient to say here too, that as the jury acquitted appellant of all malice, whatever the court may have said upon that subject was harmless to appellant. *Worley v. Moore*, 97 Ind. 15; *Stockton v. Stockton*, 73 Ind. 510. If the case were one proper for a charge upon involuntary manslaughter, and appellant wished a charge upon that subject, he should have asked it. *Powers v. State, supra*; *Simpkins v. Smith, supra*.

In the nineteenth instruction, the court charged the jury that, under the constitution, they were the judges of the law, and that all that was said to them in the way of instructions, was not for the purpose of binding their consciences, but merely to aid and assist them in a true apprehension of the law and its proper application to the evidence. We see no valid objection to this instruction.

The instructions to the jury must be for some purpose, and while the jury are the judges of the law, and their consciences are not bound by the court's instructions, yet the purpose of instructions is to aid the jury in the determination of what the law is, or there is no purpose at all, and the giving of instructions is a mere idle ceremony, although the statute requires the court to instruct the jury.

We turn now to the instructions asked by appellant and refused by the court. It is well settled that the refusal of instructions, the substance of which has been given by the court in other instructions, is not an available error. *Conradt v. Clauve*, 93 Ind. 476 (47 Am. R. 388); *Nicoles v. Calvert, supra*, and authorities there cited.

In the fifth instruction requested by appellant, the court was asked to charge the jury, that if the evidence established

an old grudge, or hostile declarations, on the part of appellant against the deceased, the jury might consider them as evidence of premeditated malice, and convict appellant of murder in the first degree. In the first place, the court had, in more than one instruction, charged the jury properly upon these subjects. In the second place, we are unable to understand why appellant should complain of the refusal of an instruction that would have put his life in jeopardy; and, in the third place, the jury acquitted him of malice.

In the sixth instruction refused, the court was asked to charge the jury that if upon the whole evidence they had a reasonable doubt as to whether a grudge existed on the part of appellant, or that he made hostile declarations in relation to the deceased, then they ought to reject all of the evidence upon these points, and allow it to have no weight in determining the guilt or innocence of appellant. The court had fully charged the jury upon the subject-matter of the instruction refused.

In the tenth and eleventh instructions given, the jury were charged that evidence of previous difficulties, ill-will, and hostile declarations on the part of appellant, was admitted for the sole purpose of proving malice; that this was the only office of the testimony, and that "if such proof be not satisfactorily made out, the testimony should go for nothing." Other portions of the court's instructions made it plain to the jury that the evidence upon these points was to be considered only in relation to the question of malice. The verdict shows that the jury did not consider it even for this purpose.

The seventh and eighth instructions refused were upon the weight to be given to testimony of hostile declarations on the part of appellant, and upon the question of reasonable doubt. The court had fully charged upon these subjects, and more strongly in favor of appellant than he had a right to demand.

The ninth instruction refused was upon the subject of self-defence, and was fully covered by the court's instructions.

We need not extend this opinion to decide as to whether or

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not the instructions refused state the law correctly. As they were all covered by the court's instructions, we express no opinion upon them.

Upon the whole case we are well satisfied that no error intervened, on account of which the judgment should be reversed. The judgment is, therefore, affirmed, with costs.

Filed Jan. 29, 1885.

No. 10,163.

THE INDIANA CAR COMPANY v. PARKER.

MASTER AND SERVANT.—Fellow Servant.—Liability of Master.—General Rule.

—As a general rule, the common master is not liable to a servant for an injury caused by the negligence of a fellow servant engaged in the same line of employment.

SAME.—Who are Fellow Servants.—Servants serving a common master in the same line of employment are fellow servants, although some may be superior to others.

SAME.—Alter Ego.—When Master is Liable.—Where a non-resident corporation entrusts to a superior resident officer, or agent, the duty of superintending the machinery of its factory and of managing its business, it is responsible to a servant who suffers an injury from unsafe or defective machinery upon which the servant is employed, under the control and direction of such officer or agent.

SAME.—Agent Representing Master.—Delegation of Master's Duties.—Where the master delegates to an agent the performance of duties which the law devolves upon him, the agent stands as the representative of the master, and a servant may maintain an action for injuries caused by the negligence of the agent in matters in which he performs the duties of the master and is his representative.

SAME.—Duty of Master to Provide Safe and Suitable Machinery.—It is the duty of the master to use ordinary care and diligence to provide safe and suitable machinery for use by the servants whom he employs to work upon it.

SAME.—Duty to Keep Machinery in Safe Condition.—The master's duty does not end with providing safe and suitable machinery, but he is also bound to exercise a reasonable supervision over it, and to exercise ordinary care in keeping it in safe condition for use by his servants, and this duty he can not rjd himself of by casting it upon an agent.

SAME.—Degree of Care Required of Master.—It is only ordinary care that is required of the master, but ordinary care requires that he should take

100	181
124	428
127	51
100	181
129	264
100	181
130	324
130	349
100	181
132	80
132	113
132	184
132	201
132	343
132	357
100	181
134	158
134	272
134	467
136	190
136	402
136	469
100	181
138	61
100	181
140	87
140	653
100	181
144	692
146	440
146	488
146	567
147	256
100	181
151	308
152	469
152	597
152	687
152	698
100	181
152	629
100	181
156	427
100	181
159	87
159	667
159	668
100	181
160	296
100	181
161	695
100	181
164	511
164	512
164	512
164	512

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100	181
1168	438
1168	458
168	461

notice of the liability of a rope to become worn and unsafe from age and use.

SAME.—*Measure of Damages.*—In computing damages, it is proper to take into consideration the pain and suffering endured by the injured servant, the expenses incurred for medical attention, the permanent effect of the injury, and its effect upon the ability of the injured person to earn money, or to pursue his trade or profession.

SAME.—*Excessive Damages.*—*Verdict.*—The appellate court will not interfere with the verdict of the jury in such a case as this on the ground that the damages are excessive, unless they are such as to induce the belief that the jury acted from partiality, prejudice or corruption.

SAME.—*Contributory Negligence.*—Where the evidence upon the question of contributory negligence is conflicting, or the inferences to be drawn from it are doubtful or not clear, the court will not decide, as a matter of law, whether there was or was not contributory negligence, but will, under proper instructions, leave the question to the jury as one of fact.

SAME.—*Obedying Directions of Vice-Principal.*—A servant can not, as matter of law, be deemed guilty of contributory negligence because he changes from one part of the machinery to another in the shop where he is employed, in obedience to the directions of the agent set over him by the master.

EVIDENCE.—*Exhibition of Injured Hand to Jury.*—It was not a material error to permit the plaintiff in the course of his testimony to exhibit his injured hand to the jury.

From the Henty Circuit Court.

W. D. Foulke, J. L. Rupe, J. H. Mellett and E. H. Bundy,
for appellant.

W. F. Medsker, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that he was employed by the appellant; that while engaged in the discharge of the duties of his employment, he received an injury, and that this injury was caused by the fault and negligence of the appellant in providing unsafe and defective machinery.

In a very able and elaborate brief, counsel for appellant argue that the appellee is not entitled to recover because the negligence which caused the injury was that of a fellow servant, the foreman of the shop in which the appellee was employed; and that for such negligence the employer is not liable.

We concur with counsel in the statement of the general principle, that a foreman is a fellow servant of those working with him, and that for the foreman's negligence in the discharge of his duties as foreman, the master is not responsible to a fellow servant. The overwhelming weight of authority sustains this general doctrine, and our own court has been one among its staunchest supporters, as a long line of decisions attest. *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226; *Slattery v. Toledo, etc., R. R. Co.*, 23 Ind. 81; *Ohio, etc., R. R. Co. v. Hammersley*, 28 Ind. 371; *Columbus, etc., R. W. Co. v. Arnold*, 31 Ind. 174; *Sullivan v. Toledo, etc., R. W. Co.*, 58 Ind. 26; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Robertson v. Terre Haute, etc., R. R. Co.*, 78 Ind. 77; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Drinkout v. Eagle Machine Works*, 90 Ind. 423.

In a recent case, *Railroad Co. v. Ross*, 31 Alb. L. J. 61, the Supreme Court of the United States, by a divided court, four of the judges dissenting, laid down a somewhat different doctrine, but, as said by a reviewer: "It is probable that a doctrine approved by Chief Justice SHAW and uniformly followed by every State, except three or four, will hold its own against a bare majority decision of the Federal court." 31 Alb. L. J. 81.

In *Columbus, etc., R. W. Co. v. Arnold, supra*, the principle was applied to a case where the servant injured was a fireman on a locomotive, and the person guilty of negligence was a master mechanic. That case is an extreme one, and does, perhaps, carry the doctrine beyond its limits.

In *Robertson v. Terre Haute, etc., R. R. Co., supra*, the servant injured was a brakeman, and the agent guilty of negligence was a train dispatcher; and in *Drinkout v. Eagle Machine Works, supra*, the servant who received the injury was employed as a laborer in the shop of which the agent, guilty of negligence, was a foreman.

In *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282, the principle was applied to the case of a "bank boss" in a coal mine,

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whose duties were the same as those of a foreman. We shall find abundant authority to the same effect outside of our own reports.

In *Wilson v. Merry*, 1 L. R., 1 Scotch & Divorce App. 326, it was held by the House of Lords that a servant employed as a miner could not recover against the owner of the mine for injuries caused by the negligence of the manager. Decisions involving similar principles will be found in *Brown v. Accrington, etc., Co.*, 3 H. & C. 511; *Wigmore v. Jay*, 5 Exch. 352; *Searle v. Lindsay*, 11 C. B. N. S. 428; *Howells v. Landore, etc., Co.*, L. R., 10 Q. B. 62 (11 Moak's Eng. R. 153); *Allen v. New Gas Co.*, L. R., 1 Exch. Div. 251.

In *Albro v. Agawam*, 6 Cush. 75, the agent guilty of negligence was the superintendent of a factory, and the servant injured was a person employed in running one of the spinning machines, and it was held that the relation was that of fellow servants. *Northcoate v. Bachelder*, 111 Mass. 322, and *Zeigler v. Day*, 123 Mass. 152, assert a like doctrine.

In the case of *Hard v. Vermont, etc., R. R. Co.*, 32 Vt. 473, the injured servant was an engineer, and the person guilty of negligence a master mechanic in charge of the locomotives, and it was held that the principal could not be made answerable. *Brown v. Winona, etc., R. R. Co.*, 27 Minn. 162, S. C., 38 Am. R. 285, decides that the relation of fellow servants exists although one is the overseer or foreman. It is, however, held in Iowa that the fact that the superior agent has charge of the subordinate ones does not change the relation from that of fellow servants, unless the superior has authority to hire and discharge subordinate servants. *Peterson v. Whitebreast, etc., Co.*, 50 Iowa, 673; S. C., 32 Am. R. 143.

In *Blake v. Maine Central R. R. Co.*, 70 Maine, 60, the remark of the judge in *McAndrew v. Burn*, 39 N. J. 115, S. C., 35 Am. R. 297, that "A fellow servant I take to be any one who serves and is controlled by the same master," was approvingly quoted, and it was held that the principle applied, although one servant was subordinate to the other. The Su-

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preme Court of Pennsylvania has held, in several cases, that the fact that one of the agents was a foreman having control of the other does not change the rule, and that they are, nevertheless, fellow servants of a common master. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 433; *Delaware, etc., Canal Co. v. Carroll*, 89 Pa. St. 374; *Keystone, etc., Co. v. Newberry*, 96 Pa. St. 246; S. C., 42 Am. R. 543. This is the doctrine of the Court of Appeals of New York. *Wright v. New York Central R. R. Co.*, 25 N. Y. 562; *Orispin v. Babbitt*, 81 N. Y. 516; S. C., 37 Am. R. 521.

The cases relied on by the appellant do not conflict with the views expressed in the cases cited by us. *Rogers v. Overton*, 87 Ind. 410, was not an action against the master, but was an action by one fellow servant against another, and is, of course, not at all in point. *Boyce v. Fitzpatrick*, *supra*, affirms, in express terms, the general principle of the cases cited by us, but decides that the master is liable for a negligent failure to provide safe machinery. *Indiana M'f'g Co. v. Millican*, 87 Ind. 87, belongs to a class of cases essentially different from the present, for it decides, what is not here immediately involved, that a master is responsible if he negligently employs an incompetent servant, and thus causes injury to another servant. The decision in *Mitchell v. Robinson*, 80 Ind. 281, directly affirms the general doctrine as we have stated it in the early part of this opinion, but declares that where the agent stands in the place of an absent master, the master is liable for his negligence in performing duties which the law requires of the master. There is, therefore, no conflict in our cases, and they have a full and firm support from the decisions of other courts.

The rules which these decisions so firmly establish as the law of this State may be thus stated :

First. The master is not liable to a servant for injuries resulting from the negligence of a fellow servant engaged in the same general line of duty, where the negligent act is performed in the capacity of servant.

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Second. Servants engaged in the same general line of duty are fellow servants although one may be a superior, and the others may be subordinate servants, under his immediate direction and control.

The facts which it is necessary to consider in connection with the rules of law stated are these: The appellant is a foreign corporation, with its chief officers and agents in another State; it owned and operated a car manufactory at Cambridge City, in this State; this factory was under the general control and management of John McCrie; the wood shop in which the appellee was injured, and where he was employed, was under the immediate control of John Higginson, as foreman.

It is obvious that the rules of law will preclude the appellee from recovering upon the ground that the foreman, in the discharge of his duties as foreman, was guilty of negligence. While Higginson was acting merely as foreman, and not discharging a duty owing by the master to its servants, he was the fellow servant of the appellee. The duties of his position as foreman did not make him anything more than a co-employee, with a higher rank and greater authority than the appellee, and so long as he kept within the line of his duties as foreman, he was a fellow servant, serving a common master. If the negligence which caused the injury occurred while Higginson was engaged in the performance of the duties imposed upon him as an employee in the same general line of service with the appellee, the employer is not liable, because the liability to injury from the negligence of a fellow servant is one of the risks of the service which the servant assumes in entering upon it. The servant does not assume any risk arising from a breach of duty by the master, but does assume the risk of a breach of duty by his co-servants. It is clear that counsel's theory, that the appellee is entitled to recover on the ground that the foreman was guilty of negligence in the performance of his duty as foreman, can not be maintained, and if there is no other ground

upon which the appellee can plant his right to a recovery, this appeal must be sustained.

It is the duty of the master to provide suitable and safe machinery, reasonably well adapted to perform the work to which it is devoted, without endangering the lives or limbs of those employed to operate it. The master is not bound to use the highest care, nor to secure the latest and most improved machinery, but he is bound to use care, skill and prudence in selecting and maintaining machinery and appliances, and for a negligent omission of this duty he is answerable to a servant injured by the omission. *Umback v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191, *vide* p. 193; *Boyce v. Fitzpatrick, supra*; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440; *Lawless v. Connecticut River R. R. Co.*, 136 Mass. 1; *Trask v. California, etc., R. R. Co.*, 63 Cal. 96; *Payne v. Reese*, 100 Pa. St. 301; *Hough v. Railway Co.*, 100 U. S. 213; *Railroad Co. v. Fort*, 17 Wall. 553; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 241; S. C., 14 Am. R. 598; *Paterson v. Wallace*, 1 Macq. 748; *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. R. 369; *Ellis v. New York, etc., R. R. Co.*, 95 N. Y. 546; *Wilson v. Willimantic, etc., Co.*, 50 Conn. 433; S. C., 47 Am. R. 653, *vide* p. 655; *Vosburgh v. Lake Shore, etc., R. W. Co.*, 94 N. Y. 374; S. C., 46 Am. R. 148; *Wood Master and Servant*, 686; 2 *Thomp. Neg.* 972; *Whart. Neg.*, section 211.

The duty which the master owes to the servant is one which he can not rid himself of by casting it upon an agent, officer or servant employed by him. The distinction between a negligent performance of duty by an agent or servant, and the negligent omission of duty by the master himself, is an important one. Where the duty is one owing by the master, and he entrusts its performance to an agent, the agent's negligence is that of the master. As the master is charged with the imperative duty of providing safe and suitable appliances, this duty he must perform, and if he entrusts it to an agent, and the agent performs it in his place, the agent's act is that

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of the master. In authorizing an agent to perform such an act, the principal is, in legal contemplation, himself acting when the agent acts, for he who acts by an agent acts by himself. This principle does not conflict with any of the general rules we have stated, for the agent assumes, by authority, the master's place, and does what the law commands the master to do. He is for the occasion, and in the eyes of the law, the master. If it be true that the agent's act is the master's act, then it must be true that the negligence involved in the act is that of the master himself. The rule which absolves the master from liability for the negligence of the fellow servant has no application whatever where the agent stands in the master's place. The reason of the rule fails, and where the reason fails, so does the rule itself. The reasons which support the rule are that servants take the risks of the employment upon which they enter, and that public policy requires that fellow servants should "each be an observer of the conduct of the other." *Farwell v. Boston, etc., R. R. Co.*, 4 Met. (Mass.) 49.

The first of these reasons completely fails when it is brought to mind that the servant does not assume the risk arising from unsafe and unsuitable machinery and appliances. The second as surely and completely fails when we affirm, as under all the authorities affirm we must, that the duty to provide safe appliances rests upon the master, and not on any servant, for, surely, servants are not bound to be observers of the master's conduct. It is, therefore, not at all difficult to clearly discriminate and broadly mark the difference between a case where it is the master's duty, as master, that is neglected, and a case where it is the fellow servant's duty, as servant, that is negligently performed. A servant has a right, himself exercising ordinary care, to rely upon his master's care and diligence. He is not bound to watch his master as he is his fellow servant. The rights are reciprocal, the master has his duty as the servant has his. When the master's duty is negligently done, he it is who is guilty of a breach of duty

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although he acted through the medium of an agent. If the master were permitted to escape his duty by shifting it to an agent, the practical result would be his entire absolution from the duty which the law imposes. The law will not permit this result, for it will not permit a duty to be evaded, but will require performance by the person upon whom it has fixed it. A different rule from that stated would, in such a case as this, wholly relieve the master from obligation to his servants, for here the foreign corporation acted by its agents, and none of its chief officers were ever at the factory in Cambridge City. If it can not be held responsible for the negligence of these agents in selecting, arranging and maintaining this machinery, the result will be that it is wholly absolved from its duty to its agents and servants.

It is clear upon principle that where the duty rests directly on the master, and he authorizes an agent or servant to perform that duty, he is bound to answer to a servant injured by the negligent performance of the duty, nor are authorities wanting. In one of our text-books it is said: "It is important at this point to remember that the master is liable where the negligence of the offending servant was as to a duty assumed by the master as to working place and machinery. A master, as we have already seen, is bound when employing a servant to provide for the servant a safe working place and machinery. It may be that the persons by whom out-buildings and machinery are constructed are servants of the common master, but this does not relieve him from his obligation to make buildings and machinery adequate for working use. Were it otherwise, the duty before us, one of the most important of those owed by capital to labor, could be evaded by the capitalist employing only his own servants in the construction of his buildings and machinery." Wharton Neg., section 232.

In a thoughtful essay upon this general subject, Judge COOLEY says: "We have seen that in some cases the master is charged with a duty to those serving him which he can not

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divest himself of by any delegation to others. He is charged with such a duty as regards the safety of his premises, the suitability of the tools, implements, machinery or materials he procures or employs, and the servants he engages or makes use of. Whoever is permitted to exercise the master's authority in respect to these matters is charged with the master's duty, and the latter is responsible for a want of proper caution on the part of the agent, as for his own personal negligence." 2 Southern Law Rev., N. S. 114, see page 123.

In *Mullan v. Philadelphia, etc., Co.*, 78 Pa. St. 25, S. C., 21 Am. R. 2, the court said: "In this case there was some evidence that the entire duty of providing the appliances for loading and unloading the vessels of the defendants, had been entrusted to the discretion of Corcoran. And just to the extent to which the proof went in fixing upon him the responsibility for the selection of the rigging and for adjusting and working it, did the same proof tend to establish the fact contended for by the plaintiff, that Corcoran was clothed, as to these duties, with the ultimate power and authority of the defendants." It was held in the case of *Gunter v. Graniteville M'f'g Co.*, 18 S. C. 262, S. C., 44 Am. R. 573, that where a superintendent was employed to secure and keep the machinery of a factory in repair, and by his negligence in the performance of that duty caused an injury to a servant in the same general line of employment, the master was responsible. The court said: "So, too, it is conceded to be the duty of the master to provide suitable machinery for the use of his operatives; and if he delegates this duty to another, he is responsible to his servant for any injury caused by the negligence of any person to whom the performance of this duty has been entrusted." In *Crispin v. Babbitt*, 81 N. Y. 516, S. C., 37 Am. R. 523, the court stated the general principle, that "The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury," and then proceeded thus: "On the same principle, however low the grade or rank of the employee, the master is liable for injuries

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caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employee. On this principle *Flike v. Boston, etc., R. R. Co.*, 53 N. Y. 549, was decided. CHURCH, C. J., says, at p. 553: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent entrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed." In *McCosker v. Long Island R. R. Co.*, 84 N. Y. 77, the same principle is recognized and enforced. The rule is thus expressed by another court: "The duties are the duties of the master, and he can not evade the responsibilities which are incident and cling to them by delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms." *Brothers v. Cartter*, 52 Mo. 372; S. C., 14 Am. R. 424.

In another case it was said: "As to the acts which a master or principal is bound as such to perform toward his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present, and liable for the manner in which they are performed." *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. R. 369.

Speaking of the duty of the master to the servant, the Supreme Court of the United States said: "Its duty in that respect to its employes is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees." *Hough*

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v. *Railway Co.*, 100 U. S. 213, 218. *Wabash, etc., R. W. Co. v. McDaniels*, 107 U. S. 454.

One of the first of the American courts to adopt and develop the doctrine that a master is not liable to a servant for the negligence of a fellow servant, and a court that has with as much sternness as any in the land enforced the doctrine, says: "The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the master may require." *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; S. C., 14 Am. R. 598. The general principle, that where the master entrusts to a servant a duty which he himself owes to those employed by him, he is liable for a negligent discharge of that duty, is also involved, and necessarily decided, in the cases of *Mitchell v. Robinson*, 80 Ind. 281, S. C., 41 Am. R. 812, and *Ohio, etc., R. R. Co. v. Collarn*, 73 Ind. 261, *vide p.* 273.

The duty of the employer to provide safe machinery and appliances is a continuing one. Thompson says: "But the master does not discharge his duty in this regard by providing proper and safe machinery, or fit servants, in the first instance, and then remaining passive. 'It is a duty to be affirmatively and positively fulfilled and performed.' He must supervise, examine, and test his machines as often as custom and experience require." 2 Thompson Neg. 984. In support of this doctrine the author cites *Warner v. Erie, etc., R. W. Co.*, 39 N. Y. 468; *King v. New York Central, etc., R. R. Co.*, 4 Hun, 769; *Shanny v. Androscoggin Mills*, 66 Maine, 420; *Lansing v. New York Central R. R. Co.*, 49 N. Y. 521; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Lewis v. St. Louis, etc., R. R. Co.*, 59 Mo. 495; *Chicago, etc., R. R. Co. v. Swett*, 45 Ill. 197; *Illinois Central R. R. Co. v. Welch*, 52

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Ill. 183; *Goheen v. Texas, etc., R. W. Co.*, 3 Cent. L. J. 382. This is the doctrine of the Supreme Court of the United States, as appears from the decision in *Hough v. Railway Co.*, *supra*.

In *Gunter v. Graniteville, etc., Co.*, *supra*, it was said: "It is well settled that it is the duty of the master to provide suitable and safe machinery and appliances for the use of his operatives; and, we think, it is also settled that his duty does not stop there, but that it is likewise his duty to keep such machinery in proper repair and in safe working order, and if these duties, or either of them, are negligently performed, and one of the servants thereby sustains an injury, the master is liable, even though he may have entrusted the performance of such duties to subordinates, by whatever name they may be called." In support of this doctrine the court refers to the cases of *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. R. 369; *Brann v. Chicago, etc., R. R. Co.*, 53 Iowa, 595; S. C., 36 Am. R. 243; *Fuller v. Jewett*, 80 N. Y. 46; S. C., 36 Am. R. 575. The rule is supported by sound principle. The duty of the master is not at an end when he first equips his factory or mill, but continues as long as there are operatives who are entitled to assume that he will use due care to provide safe machinery and appliances. It would overthrow the rule, that the risks which a servant assumes are only such as are incident to the use of machinery selected and maintained by the master with proper care, to deny the validity of our conclusion.

Ordinary care requires that a master shall take notice of the liability of the parts of the machinery to decay from age, or wear out by use. *City of Indianapolis v. Scott*, 72 Ind. 196; *Board, etc., v. Legg*, 93 Ind. 523; *Board, etc., v. Bacon*, 96 Ind. 31; *Rapho v. Moore*, 68 Pa. St. 404. It certainly needs no argument to prove that a factory owner must know that a rope, or materials of a similar character, will wear out, and that he has no right to assume that wear and use will not weaken or impair them. Ordinary prudence, therefore, re-

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quires that he should take notice of the liability of such things to wear out, and make provision for such contingencies. Reason and experience unite in affirming that an owner does not exercise even ordinary care, who gives no attention to the effect upon ropes, belts, timbers or the like, which is produced by the wear of continued use. It would be unreasonable to assert that an owner might entirely disregard the tendency of parts of his machinery to wear out, and intrench himself from liability on the ground that at the outset he had provided safe machinery and appliances.

We have ascertained the general principles which rule such cases as this, and it remains to ascertain whether they were correctly applied to the facts of this case. The appellee, on the morning that he was injured, received an order from Higginson, the foreman under whose immediate control he was, to run what was called the cut-off saw; this saw was a circular one, and worked through a groove in a table. The rope which held the saw back from the table, and in a great measure controlled its operation, broke, and the breaking of this rope caused the injury. The evidence shows that the rope was unsuitable, defective and unsafe, and there is also evidence tending strongly to show that the foreman had notice of its condition prior to the morning the injury occurred. One of the appellee's fingers was cut off, another was badly injured, his thumb was also much injured, his hand was split open to the wrist, his wrist and hand rendered stiff, and its serviceableness much impaired. He was confined to his bed for some time, abscesses formed, several bones were extracted, and he suffered great pain. He expended for medicine and surgical attention \$144.

The court did not err in instructing the jury that the appellant was responsible for the negligence of an agent appointed by it to act in its place in purchasing and maintaining machinery upon which the duties of the appellee required him to work. Nor did the court err in refusing the instructions asked by the appellant, asserting that if the appellant

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had employed a competent superintendent, it was not liable although the machinery was unsafe. It was the duty of the corporation to provide and maintain, so far at least as ordinary diligence could do, machinery safe and suitable for the purposes for which it was used, and the court was right in instructing the jury to that effect. We do not think the appellant has just reason to complain of the ninth instruction, which informs the jury that if the exercise of ordinary diligence on the part of the defendant would have apprised it of the defective condition of the rope, and it negligently allowed the rope to become worn and insecure, the plaintiff, if free from contributory negligence, would be entitled to recover. This instruction, taken, as it must be, in connection with the others, was at least as favorable to the appellant as it had a right to ask. The doubt is, whether, under the authorities, the master is not held to more than ordinary diligence in such matters; but, however this may be, the least degree of diligence to which he is held by any case is ordinary diligence.

In computing damages in such a case as this, it is proper to consider the pain and suffering endured by the injured person, the expenses incurred for medical attention, the character of the injury, whether temporary or permanent, and its effect upon the ability of the person injured to earn money or pursue his trade or profession. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Wright v. Compton*, 53 Ind. 337; *Cox v. Vanderkleed*, 21 Ind. 164; *Taber v. Hutson*, 5 Ind. 322; *Fisher v. Hamilton*, 49 Ind. 341. In this class of cases, exemplary damages can not be awarded, but full compensatory damages may be given. It is said in a text-book of excellent repute, that, "In an action for negligent injury to the person of the plaintiff, he may recover the expense of his cure, the value of the time lost by him during his cure, and a fair compensation for the physical and mental suffering caused by the injury, as well as for any permanent reduction of his power to earn money." *Shear & Redf. Neg.*, section 606. The court approved an instruction substantially like the one now before us in *Pitts-*

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burgh, etc., *R. W. Co. v. Sponier*, 85 Ind. 165, and in *City of Huntington v. Breen*, 77 Ind. 29. In *City of Indianapolis v. Scott*, 72 Ind. 196, an instruction in almost the exact language of the one under immediate mention was approved.

We think the complaint sufficiently shows that the appellee suffered special damages, for it describes the injury and avers that the "plaintiff's right hand has been permanently injured and ruined, and rendered unfit for use and labor."

It is a settled rule of law that courts will not disturb a verdict on the ground of excessive damages unless they are, as said by Chancellor Kent, so "outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption." *Coleman v. Southwick*, 9 Johns. 45. This doctrine has often been enforced by this court. *Ohio, etc., R. R. Co. v. Collarn*, *supra*; *Yater v. Mullen*, 23 Ind. 562; *Alexander v. Thomas*, 25 Ind. 268; *Reeves v. State*, 37 Ind. 441; *Hoagland v. Moore*, 2 Blackf. 167; *Guard v. Risk*, 11 Ind. 156. In a recent text-book a like doctrine is laid down, and many authorities cited. *Hayne New Trials*, section 95.

Judgment affirmed.

Filed Feb. 11, 1885.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—An able brief has been filed on the petition for rehearing, but the principal questions decided are not again discussed, counsel saying: "The view taken in the opinion, however, has such strong reasons to support it that we shall not ask the court to reconsider it."

Ninety-five reasons were stated in the motion for a new trial, and it is now complained that we did not consider all of the questions presented. We did decide all of the main questions and such as counsel fully argued, but it is perhaps true that we did not expressly decide some minor ones, although those decided really rule the case.

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The question upon the evidence as to whether Parker was or was not guilty of contributory negligence was one of fact for the jury, and not of law for the court, and as there was evidence satisfactorily supporting the verdict, we must leave it undisturbed. There are, no doubt, cases where the court will determine the question of contributory negligence, but this is not one of them. Whether Parker could have seen the defect, and whether it was such as ordinary prudence and vigilance would have enabled him to guard against, were questions of fact. Descriptions of the defect were given by the witnesses, and it is impossible for the court to say, as matter of law, that he could by exercising ordinary prudence have seen it and avoided injury. It certainly was not one open to observation, and, besides this, one of the superior agents of the corporation, its chief representative in fact, had ordered him to work upon the machinery, and we can not perceive any reason for taking the case from the jury. *Baker v. Allegheny Valley R. R. Co.*, 95 Pa. St. 211; S. C., 40 Am. R. 634. It is quite clear that it would have been error for the trial court to have instructed the jury to find for the appellant, and it follows that this court can not interfere. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Pennsylvania Co. v. Hensil*, 70 Ind. 569; S. C., 36 Am. R. 188; *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 46; S. C., 32 Am. R. 94; *City of Washington v. Small*, 86 Ind. 462, p. 469; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346; *Pennsylvania R. R. Co. v. White*, 88 Pa. St. 327; *Willard v. Pinard*, 44 Vt. 34; *Robson v. Northeastern R. W. Co.*, L. R., 10 Q. B. Div. 271; *Curtis v. Detroit, etc., R. R. Co.*, 27 Wis. 158; *Hutch. Car.* 615. In such cases as this the question must, under proper instructions, be left to the jury as one of fact.

We recognize and approve the general rule, that a servant who continues in the master's employment with full knowledge of the risk can not recover for injuries received. *Umback v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440. But that rule

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does not apply here. There is no such evidence as warrants the assumption that the appellee knew of the defective condition of the machinery, or that it was such as to subject him to any extraordinary risks. The jury by their general verdict, and also in answer to interrogatories, explicitly negative the existence of knowledge. It would be a palpable violation of long settled rules to set aside the conclusion of the jury upon the evidence as it comes to us.

A single interrogatory is selected by appellant, and upon that a judgment is demanded. This demand can not be heeded, for the answer is not such as controls, and it is only where the single answer is of controlling force that the general verdict will be set aside. This has been again and again decided. *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412, *vide* pp. 417, 418, and cases cited; *Hereth v. Hereth*, *ante*, p. 35. Besides, it has been very frequently decided that answers to interrogatories will not control the general verdict, unless there is an irreconcilable conflict, and here there is no such conflict. But if we are wrong in applying these rules, still the appellant can not succeed, for all that appears in the answer is that one of the superior agents of the corporation, the one in charge of the shop where appellee worked, had knowledge of the defect, and it is quite clear that his knowledge would not conclude the appellee. *Atlas Engine Works v. Randall*, *post*, p. 293. Even if Higginson, the foreman, had been a mere fellow servant in the same line of employment with Parker, instead of a foreman having full authority over him, it is doubtful whether knowledge on the part of Higginson would have concluded Parker.

We do not think it can be said as a matter of law that a workman is guilty of negligence who changes from one part of his work to another at the command of the agent set over him by the master. *Rogers v. Overton*, 87 Ind. 410. Here there was no change from one shop to another, no change from one branch of business to another, but only a change in the same shop from one piece of machinery to another, and we

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can perceive no reason for holding the servant guilty of contributory negligence in making such a change pursuant to the orders of his superior. It would be unreasonable to require servants to disobey the orders of a superior agent under such circumstances. A prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior. *Atlas Engine Works v. Randall, supra*; *Rogers v. Overton, supra*. There may, perhaps, be cases where it would be contributory negligence to change positions, as, for instance, where the change is made to a branch of business with which the servant is unacquainted; but this is not such a case, for here the superior agent had authority to give orders, had charge of the branch of business in which the servant was employed, and the change did not take the servant out of the line of his employment. *Dowling v. Allen*, 74 Mo. 13; S. C., 41 Am. R. 298; *Cone v. Delaware, etc., R. R. Co.*, 81 N. Y. 206; S. C., 37 Am. R. 491; *Cowles v. Richmond, etc., R. R. Co.*, 84 N. C. 309; S. C., 37 Am. R. 620; *Ryan v. Bagaley*, 50 Mich. 179; S. C., 45 Am. R. 35; *Corcoran v. Holbrook*, 59 N. Y. 517; S. C., 17 Am. R. 369; *Luebke v. Chicago, etc., R. W. Co.*, 59 Wis. 127; S. C., 48 Am. R. 483; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; S. C., 48 Am. R. 669.

In the course of his testimony, and in explaining the character of his injury, the appellee exhibited his injured hand to the jury. There was no substantial error in permitting this to be done. Wharton says: "Injury to the person may also be proved by inspection. Thus in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial." Whart. Crim. Ev., section 312. A great number of interesting cases are collected by him, all holding such evidence admissible. One among the most remarkable and amusing cases of this general character is that of *Thurman v. Bertram*, 20 Alb. L. J. 151, where a baby elephant was brought into one of the English courts. In his work on

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Trial Evidence, p. 599, Abbott says: "The injured member may be exhibited to the jury." An English author says that evidence afforded by inspection is of the highest character. 1 Taylor Ev., p. 513. By another English writer the same view is taken. Best Princ. Ev. 199. There has been much discussion as to whether a person accused of crime can be compelled to submit his person to the inspection of the jury, but it is agreed on all hands that instruments with which a crime was committed, the clothing of the accused or of the deceased, wounds and marks on their person, may be given in evidence. 15 Cent. L. J. 2 and 209; 22 Alb. L. J. 145; Rogers Exp. Tes., p. 104.

Our own decisions have, in a great variety of cases, recognized the right to submit to the jury persons and things for inspection. *Fleming v. State*, 11 Ind. 234; *Story v. State*, 99 Ind. 413; *Short v. State*, 63 Ind. 376; *McDonel v. State*, 90 Ind. 320, *vide* p. 328; *Beavers v. State*, 58 Ind. 530. Perhaps the most numerous class of cases in which the right of the jury to inspect a thing has been discussed is that in which the genuineness of written instruments has been involved, and it has been uniformly held that it is competent for the jury to make such inspections, and that they may be aided by magnifying glasses. *Lawson Exp. and Opinion* Ev. 415.

The case of *Stephenson v. State*, 28 Ind. 272, does not touch the question here involved as is evident from the statement of the court, for that statement shows that no evidence at all was offered, the trial judge holding that as the defendant was in court there was no necessity for any evidence as he could determine the defendant's age from his appearance. The case of *Ihinger v. State*, 53 Ind. 251, decides that an instruction given by the court was erroneous for the reason that it made the case turn entirely upon the personal appearance of the party rather than upon the testimony of the witnesses. The decision in *Robinius v. State*, 63 Ind. 235, does go farther and holds that the court trying the case has no right to take into account the personal appearance of the accused in de-

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termining the question of his age. Conceding the correctness of this decision, although it has been strongly assailed as requiring a judge to disregard the evidence of his own senses, still there is a distinction between such a case and the present, for where age is the material question, as it was in the case cited, the decision upon inspection really determines the whole case; while, in such a case as the present, the inspection of the wounded member simply illustrates and makes clear the testimony of the party and assists in determining the character of one of the facts in the case. There is still another distinguishing feature, and that is this, in the present case the question is not as to the effect of the exhibition of the wounded hand; while in the case cited the question was entirely as to the force and effect of the inspection of the person of the accused.

All that we are now required to decide is, whether it was substantial error to allow the appellee to exhibit to the jury in the course of his testimony his wounded hand; we are not required to determine whether the result of such an exhibition can be deemed evidence in the strict sense of the term, or what force and effect should be ascribed to it, if regarded as evidence.

Petition overruled April 23, 1885.

 No. 11,984.

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CRIMINAL LAW.—*Misconduct of Jury.*—*Separation without Leave.*—*Supreme Court.*—Under section 1842, R. S. 1881, the misconduct of a jury in separating without leave of the court, after retiring to deliberate on their verdict, is the second statutory cause for a new trial in criminal cases; but where a new trial is refused for this cause, and it appears that the jury had leave of the court to separate after they had agreed upon their verdict, and that they had agreed upon their verdict and reduced it to writing, and sealed up the same before they separated, and that such verdict was complete in every respect, except that it was not signed by the

100	201
127	225
100	201
139	533
100	201
145	673
147	134
147	379
100	201
150	85

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foreman of the jury, then it is the duty of the Supreme Court, under section 1891, R. S. 1881, to disregard the supposed error of the court below in overruling the motion for a new trial for this cause, when, in the opinion of the Supreme Court, the error, if any, is purely technical and does not prejudice the substantial rights of the defendant.

SAME.—Swearing Bailiff.—Misconduct of Jury.—Bailiff's Presence in Jury Room.—Trial.—Weight of Evidence.—Supreme Court.—It is sufficient if the jury trying a criminal cause are placed in charge of a bailiff, who has been sworn to act as such bailiff for the term. Ordinarily, the bailiff's presence in the jury room, during the deliberations of the jury on their verdict, is such misconduct of the jury as will constitute sufficient cause for a new trial; but where the question of such misconduct is tried below upon affidavits and counter-affidavits, and the court decides in effect that the defendant was not injured or harmed thereby, the Supreme Court will not disturb such decision on the weight of the evidence.

SAME.—Evidence.—Supreme Court.—In criminal as in civil causes, unless there is an absolute failure of evidence on some material point, the Supreme Court will not reverse the judgment on the evidence.

From the Kosciusko Circuit Court.

J. S. Frazer, W. D. Frazer and S. J. North, for appellant.

F. T. Hord, Attorney General, *J. S. Widaman* and *W. B. Hord*, for the State.

Howk, J.—This was a prosecution upon affidavit against the appellant, for an alleged attempt to provoke one Harlan E. King to commit an assault and battery upon him, the appellant. The prosecution was commenced before a justice of the peace of Kosciusko county, and from the justice's judgment against him the defendant appealed to the court below. There the issues joined were tried by a jury, and a verdict was returned finding the appellant guilty, as charged in the affidavit, and assessing his punishment at a fine in the sum of one cent. Over appellant's motions to set aside the verdict and for a new trial of the cause, the court rendered judgment against him for the fine assessed and costs.

The first error of which complaint is made by appellant in this court is the overruling of his motion to set aside the verdict, because the jury had separated for a period of seven hours without permission of the court, and without his knowl-

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edge or consent, before agreeing upon and sealing up their verdict. It is shown by the record that when the jury retired to deliberate upon their verdict, by the agreement of the parties, they were instructed that when they agreed upon a verdict they might seal up the same and separate, and return it into court the next morning. On the convening of court the next morning, the foreman of the jury handed to the court a paper writing, purporting to be their verdict, complete in every respect except that it was not signed by their foreman. Thereupon the court directed the jury to retire to their room for further deliberation, to which action the appellant then and there objected, for the reason that the jury had then been separated for a period of seven hours, and had been mingling with the public during that time, which objection was overruled by the court, and the appellant then and there excepted. The jury retired, and in a short time returned into court the same paper writing, and in the same words as before, with the addition of the name of their foreman.

The alleged misconduct of the jury in having "separated without leave of the court, after retiring to deliberate upon their verdict," of which the appellant complains as error, is the second statutory cause for a new trial in criminal cases. Section 1842, R. S. 1881. It was not properly assignable here as an independent error; but as it was assigned as cause for a new trial, in appellant's motion therefor, and as error is assigned here upon the overruling of the motion for a new trial, the matter complained of is thereby properly presented for our decision. The criminal code provides, in section 1842, *supra*, that "The court shall grant a new trial to the defendant for the following causes, or any of them: * * * * * *Second*. When the jury has separated without leave of the court, after retiring to deliberate upon their verdict." This section of the criminal code has specific application, of course, to what the trial court shall do in the cases enumerated therein. When the action of that court, in any of the cases specified, is brought before this court upon appeal, section 1891, R.

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S. 1881, of the criminal code, prescribes our action, as follows :
“ In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant.”

Now, if it be conceded that under the instructions of the court the jury had no leave of the court to separate, after they had agreed upon their verdict and reduced it to writing, until it had been signed by their foreman, still, upon the facts shown by the record and heretofore stated, and conceding, without deciding, that the action of the trial court thereon was erroneous, we would be bound to disregard such error; for we are clearly of the opinion that the error, if such it may be called, was purely technical and did not prejudice the substantial rights of the appellant. Moore Crim. L., sections 310, 417 and 419; *Jarrell v. State*, 58 Ind. 293.

The next error assigned upon the record is that the court erred in permitting the prosecuting attorney, when stating the case to the jury, to say that the defendant had been convicted before a justice of the peace, and had appealed therefrom. There is no substance in this assignment of error. In the statement of the case to the jury, the State's attorney had the right to tell them how and where the case originated, and how it had found its way into the circuit court. But, even if the action of the court were erroneous, it would be our duty, under section 1891, above quoted, to disregard the error, because, in our opinion, it did not prejudice the substantial rights of the defendant. *Shepherd v. State*, 64 Ind. 43; *Combs v. State*, 75 Ind. 215; *Morrison v. State*, 76 Ind. 335.

It is claimed by appellant's counsel that the court erred in sending the jury out, after their separation, when it was shown that their verdict was not signed by their foreman, to deliberate upon their verdict. It appears from the record, we think, that the substantial rights of the appellant were not prejudiced by this action of the court; for the record shows, as we

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have seen, that the jury afterwards returned into court the same verdict, in the same words, with the addition only of the name of their foreman.

Appellant's counsel also insist that the court erred in placing the jury, when they retired for deliberation, in charge of a bailiff who was not sworn as such for that jury. It appears from the record that the officer in question had been sworn as bailiff of the jury for the term, and this would seem to be sufficient. Section 1828, R. S. 1881; *Hittner v. State*, 19 Ind. 48. At most the error, if such it be, was technical and did not, in our opinion, prejudice the substantial rights of the defendant. The affidavits in the record show that the bailiff of the jury performed his duties as such, in the manner required by the statute.

It is claimed by appellant's counsel that a new trial ought to have been granted for alleged misconduct of the jury in permitting their bailiff to be present in the jury room, at and during their deliberation. Upon this question affidavits and counter-affidavits were filed, and it was decided in favor of the State. We can not disturb this decision on the weight of the evidence. *Holloway v. State*, 53 Ind. 554; *Weaver v. State*, 83 Ind. 289; *Doles v. State*, 97 Ind. 555.

It is insisted, also, that the verdict of the jury was not sustained by the evidence. There is evidence in the record tending to sustain the verdict of the jury on every material point. In such case, this court will not, even in a criminal cause, disturb the verdict or reverse the judgment merely on the weight or sufficiency of the evidence. *Cox v. State*, 49 Ind. 568; *Long v. State*, 95 Ind. 481; *Doles v. State*, *supra*. It is claimed that the venue of the cause was not shown by the evidence, but in this, we think, counsel are mistaken. *Whitney v. State*, 35 Ind. 503; *Cluck v. State*, 40 Ind. 263; *Luck v. State*, 96 Ind. 16. The evidence in the record and the course of the trial were sufficient, we think, to authorize the jury to find that the offence was committed in Kosciusko county; and in such case, where there is no evidence to the contrary, and the verdict has met the approval of the trial

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court, we ought not to disturb the verdict, on such a technical objection, upon the mere weight or sufficiency of the evidence.

It was in the discretion of the trial court, whether or not it would permit appellant to cross-examine persons whose counter-affidavits were filed by the State against the motion for a new trial, or give him time until the next day to file additional affidavits in support of such motion. The record fails to show that the court abused its discretion, in either of these particulars.

The judgment is affirmed, with costs.

Filed Jan. 31, 1885.

No. 10,721.

CITY OF NEW ALBANY ET AL. v. WHITE.

PRACTICE.—*Striking out Pleadings.*—*New Trial.*—That a pleading or part thereof has been erroneously struck out, is not cause for a new trial; such ruling can only be presented to the Supreme Court by an assignment of error founded thereon.

INJUNCTION.—*City.*—*Streets.*—Where a city is about to take land for a street wrongfully, under color of right, without assessment and tender of compensation, the owner may have injunction.

From the Floyd Circuit Court.

J. V. Kelso and J. H. Stotsenburg, for appellants.

A. Dowling, for appellee.

COLERICK, C.—This action was instituted by the appellee against the appellants, to enjoin them from entering upon certain land, alleged to be owned and occupied by the appellee, and removing therefrom the fences, trees and improvements thereon, and using the same for a street.

It was averred in the complaint, that the appellee was then, and for more than eight years prior thereto had been, the owner in fee simple of the following described real estate in the city of New Albany, Indiana, to wit: All that part of out-lot C, north of Upper Elm street, which begins at a

point on the line of said street five feet eastward from the southwest corner of said out-lot; thence eastward along the line of said street twenty-five feet; thence, at right angles, northward two hundred feet to an alley; thence, at right angles, westward along the line of said alley twenty-five feet, and thence, at right angles, southward two hundred feet, more or less, to the place of beginning; that he had expended large sums of money in grading said land, and had caused it to be enclosed with substantial fences, and set in grass, and had planted, and was then cultivating, therein a large number of valuable fruit-bearing trees; that he was also the owner and in the possession of other real estate immediately adjacent to said land, on the eastern side thereof, fronting one hundred and twenty-two and a half feet on said Upper Elm street and extending back northward therefrom two hundred feet, on which a large and valuable brick building, used and occupied as a family residence, and divers out-building, sheds and other improvements were located, the convenient use and value of which greatly depended upon and were largely increased by the land first described, which was embraced in the enclosure upon which said buildings were erected; that the city of New Albany and its co-appellant Carpenter, the marshal of said city, were then threatening to enter upon the land first described, and remove therefrom said fences and improvements, and cut down said fruit trees; that in pursuance of said wrongful and unlawful design, the common council of said city, at a regular meeting thereof, held on the 7th day of March, 1879, adopted a resolution and passed an order directing and requiring said Carpenter, as such marshal, to perform the acts so threatened, and throw open the appellee's said enclosure, and that said marshal had notified the appellee that he would thereafter, on a day named, proceed to execute said order, and that appellee believed that said marshal would execute the same unless he was restrained by the court from so doing.

It was further averred that no proceedings had been taken

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by the city to condemn or appropriate said land, as or for a street or other public highway, and that no assessment of benefits and damages had been made by the city commissioners, as provided by the statute in such cases, and that no license to enter upon and appropriate said land had ever been granted to said city by the appellee or his grantors, and that the proceedings of the city were wrongful, unlawful and without authority, and that said land and the improvements thereon, were reasonably worth \$7,000, and that said land was necessary to the convenient use and enjoyment of said residence, and that the opening of said enclosure and the removal of said fences and the use of said land by the city as a street or highway would cause irreparable damage to said premises and to the appellee. Wherefore he prayed that the appellants be enjoined from doing said acts, etc.

To this complaint an answer, in four paragraphs, was filed. The first paragraph was a general denial. On motion of the appellee a part of the third paragraph was stricken out, on the ground that the matters therein stated were immaterial, and, if material, might be proved under the first paragraph. Separate demurrers to the several paragraphs, except the first, were then overruled, and thereupon a reply was filed.

The issues, so formed, were tried by the court, resulting, over a motion for a new trial, in a finding and judgment in favor of the appellee.

The errors assigned are: 1st. That the court erred in overruling the motion for a new trial. 2d. That the complaint does not state facts sufficient to constitute a cause of action. The only causes specified in support of the motion for a new trial, urged in this court, are, that the finding of the court was not sustained by sufficient evidence, and that the court erred in sustaining the motion to strike out a part of the third paragraph of the answer, above referred to.

The evidence is set forth in the record. It is conflicting, but tends to sustain the finding of the court, and, therefore, it is unnecessary, and would be useless in this action, for us

to consider and determine the many interesting and important questions arising out of the weight of the evidence, which have been presented and ably argued by counsel, as we can not, under the long and well established practice of this court, disturb the finding of the court on the weight of the evidence.

The ruling of the court on the motion to strike out a part of the third paragraph of the answer constituted no cause for a new trial. See *Chase v. Arctic Ditchers*, 43 Ind. 74; *Daubenspeck v. Daubenspeck*, 44 Ind. 320; *Tucker v. Call*, 45 Ind. 31; *Hamilton v. Elkins*, 46 Ind. 213. Such a question can be presented to this court for review only by an assignment of error founded on the ruling. *Reed v. Spayde*, 56 Ind. 394; *Cates v. Thayer*, 93 Ind. 156. As stated in *Reed v. Spayde*, *supra*, "The question is not properly presented. If an error was committed it was not an 'error of law occurring at the trial.' It is obvious that a new trial would not correct such an error; for after a new trial was granted, the error would stand in the record the same as before." In this case the ruling complained of has not been presented to this court by an assignment of error founded thereon, and, therefore, its correctness is not properly before us for consideration. No error was committed in overruling the motion for a new trial.

The only objection urged by the appellants to the sufficiency of the complaint is, that it does not present a case for an injunction. We think otherwise. An injunction is the proper remedy to prevent the making of a permanent location of a street or other highway, on the land of an individual, under color and claim of right, before just compensation has been assessed and tendered therefor. See *Hilliard Inj.* 641; *Sidener v. Norristown, etc., Turnpike Co.*, 23 Ind. 623; *Kyle v. Board, etc.*, 94 Ind. 115. And to same effect, *Erwin v. Fulk*, 94 Ind. 235. In *High on Injunctions* (2d ed.), section 578, it is said: "The preventive jurisdiction of courts of equity by the writ of injunction is frequently invoked to restrain the opening of streets and highways because of the refusal or

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omission of the public authorities to make proper compensation to property owners for damages incurred in taking their land for public use. And the principle is well established in cases of streets and highways, as in cases of railroads, that the failure to make or tender due compensation to the owner of land for damages incurred by taking his land for the purposes of a road or street, will justify relief by injunction at the suit of the property owner until his damages are properly adjusted, or until just compensation is made therefor. In such cases the jurisdiction is exercised for the prevention of irreparable injury which would necessarily result from the prosecution of such public works without just compensation being first made to the property owner, the ordinary legal remedies being regarded as inadequate to afford satisfactory relief."

The complaint was sufficient.

As there is no error in the record the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed at the costs of the appellants.

Filed Dec. 13, 1884. Petition for a rehearing overruled April 25, 1885.

No. 10,458.

KISTNER, EXECUTRIX, v. CITY OF INDIANAPOLIS ET AL.

CITY.—*Power over Streets.—Railroad Tracks.—Running of Trains.—Security of Citizens.—Non-Exercise of Legislative Power.—Liability for Personal Injury.*—Under section 3161, R. S. 1881, the common council of an incorporated city has exclusive power over the streets, highways and alleys within such city, and may grant a railroad company the right and privilege to lay down and use railroad tracks over, along or across such streets, highways or alleys. Under the *forty-second* clause of section 3106, R. S. 1881, such common council may provide, by ordinance, for the security of citizens and others from the running of trains through the city, and, to that end, may require such railroad company to provide and use suitable safeguards at the intersections of streets, highways or alleys, or elsewhere, within such city; but such city is not liable in damages for injuries to persons or property, which may result from the non-exercise of such legislative power by its common council.

100	210
130	78
100	210
145	639
146	71
146	437
100	210
152	466
100	210
155	26

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RAILROAD.—*Negligence.—Proximate Cause.—Intervening Agency.—Sufficiency of Complaint.*—In an action to recover damages for the death of the plaintiff's testator, caused, as alleged, by the defendants' negligence, there is no error in sustaining a demurrer to the complaint, where it appears, upon its face, that such negligence was not the proximate cause of such death, but that it resulted directly from the act of an intervening agency, over which the railway company defendant had no control.

From the Marion Superior Court. .

N. B. Taylor, F. Rand and E. Taylor, for appellant.

C. S. Denny, T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and E. Daniels, for appellees.

HOWK, J.—This was a suit by the appellant, Rosina Kistner, executrix of the last will of John G. Kistner, deceased, against the appellees, the City of Indianapolis and the Union Railway Company of Indianapolis, to recover damages for the death of her testator, caused, as alleged, by the wrongful acts or omissions of the appellees, and each of them. The appellant's complaint was in three paragraphs, to each of which the separate demurrers of the appellees, who severed in their defence, were sustained by the court at special term. The appellant excepted to these rulings of the court, and, declining to amend or plead further, judgment was rendered against her for the appellees' costs. On appeal this judgment was affirmed by the general term, and from the judgment of affirmance this appeal is now here prosecuted.

By a proper assignment of error, the appellant has brought before this court for decision the question of the sufficiency of the facts stated in each paragraph of her complaint to constitute a cause of action in her favor and against each of the appellees.

In the first paragraph of her complaint, the appellant alleged that each of the appellees was a corporation organized and acting under the laws of this State; that there was, and had been, in the city of Indianapolis, since its original survey, a public street called "Illinois street," which had been and was used for travel and passage as a public street; that Illinois street ran north and south through the city of In-

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dianapolis, and on and adjoining such street, on the east side thereof, and between two streets of such city called Louisiana street and McNabb street, which ran east and west at right angles with Illinois street, the appellee, the Union Railway Company, owned the building and premises known as and called the "Union Depot," and seven railroad tracks connected therewith; that five of such railroad tracks were laid down in and ran through such Union Depot from east to west, and extended entirely across Illinois and its west sidewalk, and two of such railroad tracks were laid down in and ran along Louisiana street, and across Illinois street and its west sidewalk, nearly parallel with the other five tracks and immediately north of and only a few feet from the most northerly of such five tracks, and that the distance from the north edge of the most northerly of the seven tracks, to the south edge of the most southerly of the same, did not exceed two hundred feet; that the seven railroad tracks were laid down and owned by the appellee, the Union Railway Company, to which company the appellee, the city of Indianapolis, granted and gave the right to use and occupy the said part of Illinois street for, with and by such railroad tracks, and to maintain and use the same for running trains out of, into and from such depot by steam locomotives; that such grant was made by the city of Indianapolis to the Union Railway Company more than ten years prior to the filing of this complaint, and immediately thereafter the company laid down the railroad tracks, and had since maintained and used the same for running trains of cars into, through and from the Union Depot by means of locomotives propelled by steam; that the city of Indianapolis knew, when it made such grant and gave such permission to occupy such street with and lay the railroad tracks in and across Illinois street, that it would make the crossing dangerous and liable to accident; that the seven tracks were used by fourteen railroad companies in connection with the Union Depot, by license of the Union Railway Company, which fourteen companies pay the Union Railway Company toll or

rent for the use of the depot and its tracks, and trains of cars drawn by locomotives, propelled by steam, were and had been passing and repassing on and over the seven tracks, or some of them, across said part of Illinois street and the west sidewalk thereof, every hour in the day and night for ten years, and sometimes trains were passing on each track at the same time.

Appellant further alleged that it was the duty of the city of Indianapolis when it made such grant to the Union Railway Company of the right to occupy Illinois street with its railroad tracks, and to use the same in connection with its depot for the purposes aforesaid, to provide for the proper care and protection of such street and sidewalk, at the crossing of the railroad tracks, and to require that the Union Railway Company should provide for and maintain the proper and suitable protection and safeguards, so that the passage of vehicles and passengers on, along and over the part of Illinois street and sidewalk used, occupied and crossed by the seven railroad tracks, would be safe and convenient for travel and passage, and kept in that condition, and to see that the Union Railway Company suitably and properly protected and provided for the safe passage over and use of such part of Illinois street and sidewalk by the citizens of the city and the public generally, having occasion or need to pass on, along or over the same; and in case of the failure of the Union Railway Company so to do, or if the city of Indianapolis failed to compel such company to make and keep up such protection and safeguards, it was then the duty of such city to make, keep up and continue such provisions for the protection of said crossings; but the appellant averred that the city of Indianapolis had wholly disregarded its duty in that behalf, and did not require the Union Railway Company to put and properly keep up suitable guards, and provide for their maintenance and use, so as to protect travellers along such street and across such railroad tracks from harm, and had never taken any steps to compel such company so to do; that the Union Railway Company had never put up, nor kept and

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maintained, proper or sufficient guards upon, nor on either side of, such seven tracks, nor made suitable or any provision, nor kept up, maintained and used the same, for the protection of travellers on or along and across the part of Illinois street and sidewalk, across such railroad tracks, although it was the duty of such company so to do, without order from or compulsion by the city of Indianapolis; and that the Union Railway Company knew that the crossing was dangerous, and accidents were liable to happen at any hour of the day or night, and that it was necessary the crossing should be protected and guarded to prevent accidents from the use of such tracks.

The appellant then alleged, at great length and with some repetition, the duty of the city of Indianapolis to provide and maintain proper and suitable safeguards for the protection of all persons passing to and fro on Illinois street and its sidewalk, in vehicles or on foot, over the crossing of the seven railroad tracks, the knowledge of the city that the crossing was very dangerous, and that accidents were liable to occur there at any time, and the total failure of the city, with such knowledge, to provide or maintain any safeguards or protection at such crossing, and that no guards or protection of any kind had ever been provided or used to protect from harm or injury travellers or passengers, on foot or in vehicles, upon such part of Illinois street and sidewalk, across such railroad tracks, although such provision and protection were of the first necessity; that the street and sidewalk, where the same were crossed by the seven railroad tracks, were in the central and most populous portion of the city of Indianapolis, and were much used by citizens of the city and other persons who had no convenient way of avoiding or going around such crossing; that such crossing might have been protected and rendered sufficiently safe for persons using the same and passing along and over the street and sidewalk, by placing movable bars or safety-gates or guards across such street and sidewalk just north and south of the

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seven railroad tracks, and providing a watchman to operate the same and close such bars or guards when trains of cars were passing on and over any of such tracks across such street and sidewalk; that it was proper, necessary and usual on streets in cities, where crossings by railroad tracks were located, to put up, keep in order and use such bars or gates, or other sufficient safeguards, to prevent injury to and protect from harm persons passing along and over such crossings, and to prevent trains of cars from coming in contact with such persons, and also to prevent vehicles, drawn by horses, from being driven upon and over such crossings when trains or locomotives were moving on or over such crossing on any track on and crossing such street or sidewalk, and from coming in contact with or injuring persons passing on and over such crossing at such times, and especially to prevent the occurrence of accidents and injuries such as the one thereafter mentioned; and it was the duty of the appellees to put up, keep and maintain such sufficient barriers or other safeguards, and to have the same constantly kept in place and used for the purposes aforesaid, at the crossings of the seven tracks on and over Illinois street and its sidewalk.

The appellant further alleged that the appellees and each of them were guilty of gross neglect, the city in permitting the seven tracks to be used by the Union Railway Company, without being protected by such movable bars, safety-gates or other safe and suitable protection, and the Union Railway Company in using such tracks and permitting them to be used by other railroad companies without being protected by such movable bars, gates or other sufficient safeguards; and no protection or proper safeguard of any kind had been made, provided or used at such crossing to prevent injury to persons passing along and across such seven tracks.

The appellant further alleged that, on April 19th, 1881, her testator, John G. Kistner, was a citizen of the city of Indianapolis, and in full life, and was engaged in business at No. 83 on South Illinois street, in such city, a short distance

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north of the crossing of such street and its west sidewalk by the seven railway tracks aforesaid, and he resided south of such crossing of such street and sidewalk, at No. 336 on South Meridian street, and his most direct route in passing between his dwelling-house and store was along Illinois street and across the part thereof crossed by such seven railroad tracks; that on the evening of April 19th, 1881, the appellant's testator, John G. Kistner, started from his store to go to his dwelling-house, walking on and along the west sidewalk of Illinois street across such seven tracks, and the sidewalk across such tracks was at the time clear and unobstructed by trains, cars or locomotives, or other vehicles of any kind; that soon after he had started across such tracks, but while he had sufficient time to pass across the tracks upon which the train, thereafter named, was backing, if not wrongfully interfered with or prevented, before any trains, locomotives or cars would reach such west sidewalk, a train of the Indianapolis, Decatur and Springfield Railway Company, one of the companies that had the right to and did use the seven tracks aforesaid, commenced backing out of the Union Depot on one of such tracks, and John G. Kistner had passed south of the track such train was backing upon and was entirely clear of and free from any danger from such train if not wrongfully interfered with; that after such train had commenced backing as aforesaid, a wagon and team belonging to the firm of Archdeacon & Co., driven by one of their employees along Illinois street from the part thereof south of the seven tracks, were driven north upon and commenced crossing the seven tracks, and when such employee had got within a short distance of and was approaching the track on which such train was backing, he found that the train had moved so far back that he could not pass it without making a circuit and driving further west near to and upon the west sidewalk of the part of Illinois street crossed by the seven tracks; and to preserve his own life and the lives of his team and save his wagon from destruction, it was necessary that such driver

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should, and he then and there did, make a circuit and drive the team and wagon further west and near to and upon such west sidewalk and around and abreast of the backing train; and, in so doing, the wheels of the wagon struck the said John G. Kistner and knocked and threw him down under the wheels of such moving train, which was backing at the time as aforesaid, and the wheels of the cars of such moving train passed over and crushed the body of the aforesaid John G. Kistner, who was then and there and thereby instantly killed. The appellant then averred that her testator, John G. Kistner, was so deprived of his life by and through the gross negligence of the appellees and each of them, in failing to provide, maintain and use the proper, suitable and necessary safeguards for the crossing of the seven railroad tracks over and across Illinois street and the sidewalk thereof, and without any negligence on his part; and that he left surviving him the appellant, his widow, and eight children, as his heirs at law, for whose use this suit was brought. Wherefore, etc.

The "material difference" between the three paragraphs of appellant's complaint is thus stated by her counsel: "The first charges that the act which resulted in the death of John G. Kistner occurred without the fault of Archdeacon & Co.; while the others show that the proximate cause of his death was the negligence of Archdeacon & Co., but charge that such negligence was of a character which the defendants ought to have provided against, and, failing to do so, are liable for all the consequences." This, we think, is a fair and correct statement of the difference between the three paragraphs of complaint, and, as we have given a full summary of the facts alleged in the first paragraph, it is unnecessary for us to state the substance even of the other two paragraphs in this opinion.

We have given appellant's counsel the benefit of a full statement of the facts alleged in the first paragraph of the complaint, and whatever may be said of the sufficiency of any paragraph of the complaint, it must be conceded, as it

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seems to us, that the learned counsel have made the very best possible use of the facts at their disposal in their statement of the appellant's case. If counsel were right in their statement of the legal duties of each of the appellees in the several paragraphs of the complaint, it might be difficult, if not impossible, to avoid the conclusion that each paragraph stated facts sufficient to constitute a cause of action. But here, as it seems to us, lies the fundamental difficulty in each paragraph of the complaint, as against each of the appellees: the appellant has misapprehended, or, at least, misstated, the legal duties of each appellee, and especially so of the city of Indianapolis. In each paragraph of the complaint it is stated that each appellee is a corporation, organized under the laws of this State. But, of course, the city of Indianapolis is a municipal corporation, organized under and governed by the general laws of this State for the incorporation of cities; while the Union Railway Company is a corporation organized under and governed by other and entirely different statutes of this State. As to each of the appellees, however, it may be properly said that the rights, powers and duties of each corporation are, in the main, such as are expressed in, or clearly implied from, the law of its creation. Every corporation is the mere creature of the statute under which it is incorporated, and, as a general rule, the rights it possesses, the powers it may exercise and the duties enjoined upon it are to be found in or gathered from the statutory provisions which constitute the law of its being.

Does the appellant's complaint, or any paragraph thereof, state a cause of action against the appellee, the City of Indianapolis? There can be no doubt in regard to the power of the city of Indianapolis over the streets of such city, and over Illinois street and its sidewalk at the place where the appellant's testator lost his life. The power of the city over the streets, highways and alleys within its corporate limits is an "exclusive power." Section 3161, R. S. 1881. Nor can it be doubted that the city had the power to grant its co-appellee,

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the Union Railway Co., the right and privilege to lay down and use the seven railroad tracks, leading from the Union Depot over and across Illinois street and the sidewalk thereof, within the city; nor that, in the exercise of such power, the city might have made such grant upon the express condition that its co-appellee should erect, maintain and use movable bars, safety-gates or other suitable safeguards for the protection of persons and property passing over and along Illinois street and its sidewalk at the crossing thereof by the seven railroad tracks. In the *forty-second* clause of section 3106, R. S. 1881, it is enacted that the common council of the city shall have the power to "provide, by ordinance, for security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same." We think therefore that the power of the city of Indianapolis to have compelled the Union Railway Co. to erect, maintain and use such proper and suitable safeguards, as seemed best to the city, at the place where the seven railroad tracks crossed Illinois street and its sidewalk, is clear and unquestionable.

But this power of the city is clearly, we think, a legislative or governmental power, conferred upon the city authorities and to be exercised or not in their discretion. It will not do to say that, for the non-exercise of this power, the city of Indianapolis can or ought to be held liable in damages to the appellant for the death of her testator. The case in hand as against the city can not be distinguished in principle from *Brinkmeyer v. The City of Evansville*, 29 Ind. 187, which was a suit against the city to recover damages caused as alleged by the failure of the city authorities to exercise the power conferred upon the corporation to provide water and efficient engines and apparatus for the extinguishment of fires. The court there said: "A municipal corporation is, for the purposes of its creation, a government possessing to a limited extent sovereign powers, which, in their nature, are either legislative or judicial, and may be denominated governmental or public. The extent to which it may be proper to exercise such powers,

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as well as the mode of their exercise, by the corporation, within the limits prescribed by the law creating them, are, of necessity, entrusted to the judgment, discretion and will of the properly constituted authorities, to whom they are delegated. And being public and sovereign in their nature, the corporation is not liable to be sued, either for a failure to exercise them, or for errors committed in their exercise." The doctrine of the case cited, upon the point under consideration, has never been questioned in this court so far as we are advised, but it has been expressly approved and followed in the following more recent cases: *Faulkner v. The City of Aurora*, 85 Ind. 130; *Robinson v. The City of Evansville*, 87 Ind. 334; *City of Lafayette v. Timberlake*, 88 Ind. 330.

The cases cited are decisive of the appellant's case against the city of Indianapolis, as stated in each paragraph of her complaint, against her and in favor of such city. It is true that it is alleged in each paragraph of complaint, that it was the duty of the city of Indianapolis to provide and maintain proper safeguards for the protection of citizens and other persons passing on and along Illinois street and its sidewalk over and across the seven railroad tracks. But appellant's counsel have referred us to no provision of the statute, and we know of none, which imposed any such duty upon the city. Our conclusion is that the court committed no error in sustaining the separate demurrer of the city of Indianapolis to each paragraph of the complaint.

We are of opinion, also, that no error was committed by the court in sustaining the separate demurrers of the appellee, the Union Railway Company, to each paragraph of appellant's complaint. It clearly appears from the facts alleged in each paragraph, that the proximate cause of the death of appellant's testator was the act of the driver of the wagon of Archdeacon & Co., whether such act was negligent or otherwise, and, of course, that the negligence of the Union Railway Company, alleged in each paragraph, was not the proximate cause of such death. The intervening agency here was

The Evansville and Terre Haute Railroad Company v. Griffin.

so direct and positive in its nature and effect that the death of the testator can not be attributed, we think, to the alleged negligence of the Union Railway Company. Here lies the difference, as it seems to us, between the case at bar and the cases of *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166, and *City of Crawfordsville v. Smith*, 79 Ind. 308, cited and relied upon by the appellant. Those cases are not in point here, and are not in conflict with what we now decide.

The judgment is affirmed, with costs.

Filed Feb. 13, 1885.

No. 11,254.

THE EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY v. GRIFFIN.

NEGLIGENCE.—*Actionable when*.—An action for negligence will only lie where the defendant was under some duty to the plaintiff which he has omitted to perform.

SAME.—Where one merely permits others, for their own accommodation, to pass over his lands, he is under no legal duty to keep them free from pitfalls or obstructions which may result in injury. *Aliter*, if he invite or induce such passage.

SAME.—*Pleading*.—*Contributory Negligence*.—A complaint for negligence resulting in injury, in which it fairly appears that the plaintiff needlessly took the risk of probable danger, does not sufficiently negative contributory negligence by the averment that the injury occurred "without any negligence on the part of the plaintiff."

From the Posey Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellant.

W. P. Edson, for appellee.

MITCHELL, J.—The complaint in this case charges that the Evansville and Terre Haute Railroad Company was "possessed" of a certain piece of ground lying in the western part of the city of Mount Vernon; which was uninclosed and which was traversed by a foot-path leading from the public

100	221
134	276
186	442
100	221
142	485
143	700
100	221
145	256
100	221
154	53
100	221
158	67
158	68
158	625
100	221
160	275
100	221
162	562
100	221
167	336
168	341
100	221
170	88
170	177

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street to a house situate on another piece of uninclosed ground adjoining it, and which was also in the possession of the railroad company. The complaint then avers, "that there was no public street, alley or way leading from the streets and alleys of said city to said house, and that the said path was the usual way of passing to and from said house; that the defendants, being so as aforesaid possessed of said piece of ground, wrongfully permitted a deep well which was thereon and near said path to be and remain open, uninclosed, unguarded and unsafe to persons, lawfully passing along said path, whereby, on the 9th day of December, 1882, shortly after it became dark, the plaintiff, who was a shoemaker at work at his trade in said city, while lawfully passing along said path from his work to said house, where he was boarding with the occupants thereof, who were tenants of the defendants, and without any negligence on his part, accidentally passed a short distance away from said path in the night time, as aforesaid, and fell into said well and was seriously injured and permanently disabled from working at his trade, whereby," etc.

One of the errors assigned here is, that the court erred in overruling the demurrer to the complaint. Whether this complaint is good or not must depend upon a consideration of two questions:

1. Taking the facts as stated, did the railroad company, in permitting its premises to be crossed in the manner stated, and in leaving the well into which the plaintiff fell uncovered, violate any legal duty or obligation which it owed him, of which he has the right to complain? and,

2. Was the appellee in the exercise of due care when he "accidentally passed a short distance away from said path in the night time" and fell into the well?

Before it can be affirmed that the appellant was negligent, with respect to the transaction concerning which its omission is imputed to it as wrongful, it must appear that it was under some legal duty or obligation to the plaintiff, at the time when

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and place where the injury occurred, which was left undischarged. If it is liable at all, this is the foundation upon which its liability rests.

The owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and, as has often before been said, enjoys the license with its concomitant perils.

If, however, the owner or occupant of lands, by any enticement, allurements or inducement, causes others to come upon or over his lands, then he assumes the obligation toward persons so coming, to provide a reasonably safe and suitable way for that purpose. An owner may not by invitation, either express or implied, induce another to come upon or pass over his premises, without keeping them in such condition of safety as to admit of his passing over by the means designated or prepared without injury, provided he uses due care. To make the owner or occupant liable for an injury received by one passing over his premises, something more than a mere passive acquiescence in the use of his land by others is necessary. So long as his lands are used by others, be it never so frequent, for their own convenience, he is not liable. But if, by some act or designation of his, persons are led to believe that a way or path over premises was intended to be used by travellers, or others having lawful occasion to go that way, then as to such persons the owner or occupant comes under an obligation to keep it free from dangerous obstructions or pitfalls which might cause them hurt. The inducement must be equivalent to an invitation, either express or implied; mere permission is not sufficient. *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 216.

It does not appear from the complaint in this case who was the owner of the *locus in quo*, the averment being that "the defendants were possessed of a certain piece of ground," and

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that "the defendants, being so possessed of said piece of ground, wrongfully permitted," etc. Nor is there anything to show how long the appellant had been in possession before the injury occurred; and while it is averred that "said path was the usual way of passing to and from said house," it is not averred that there was not another safe and convenient way which was designed by the owner as the way of approach to his house. From all that appears in the complaint, the tenant who occupied the house, and the boarders, may have habitually chosen this path for their own convenience, without any invitation or inducement from the owner, and because they and other persons usually chose that way, rather than some other which may have been, for all that appears in the complaint, designed by the owner, they can place it under no obligation to look out for their safety.

The complaint fails to show either the knowledge or permission of the appellant so to use its lands; while, as we have seen, something more than knowledge and acquiescence of the owner is necessary in order to put him under the obligation to keep the path safe.

For all that is disclosed, the tenant and his boarders, including the plaintiff, may have made the very path which he was pursuing when the injury befel him, and granting, though it is nowhere averred, that the railroad company knew of, and sanctioned, the use of its premises in this manner, this falls far short of making it liable. If it were alleged, or if it could be inferred from the complaint, that this path was in any way designed, prepared or intended by the owner as a means of approach to the house, or if it appeared by averment or inference that no other convenient way of approach, either public or private, had been prepared or designated by the owner, as a means of access to the house, the case would be entirely different; and it would be different too, if it were a case like *Graves v. Thomas*, 95 Ind. 361 (48 Am. R. 727), where a path had been used as a part of the public sidewalk for such a length of time as to give the public rights in it as such.

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Lary v. Cleveland, etc., R. R. Co., 78 Ind. 323 (41 Am. R. 572); *Sweeney v. Old Colony, etc., R. R. Co.*, 10 Allen, 368; *Knight v. Abert*, 6 Pa. St. 472; 1 Thomp. Neg., p. 303, section 3, and authorities cited; *Jeffersonville, etc., R. R. Co. v. Goldsmith*, 47 Ind. 43; *Hargreaves v. Deacon*, 25 Mich. 1. We think, however, that the averments in the plaintiff's complaint do not repel the presumption of contributory negligence, or rather, that upon the facts stated in the complaint, a presumption of negligence on the part of the plaintiff arises.

He avers that he was a boarder with the occupants of the house which he was approaching at the time of the injury. Whether or not he knew of the location and condition of the well, at the time he undertook to pass, the complaint does not inform us.

Being a boarder at the house to which this path led, if the well, in an open unenclosed lot, was in such close proximity to it that it was negligence in the owner or occupant to leave it unguarded, the strong probability is that he must have discovered it, and in the absence of any averment to the contrary, we must, under all the circumstances disclosed in the complaint, presume that the appellee had as full knowledge of the existence, location and condition of the well as the railroad company had.

If he undertook to follow the course of the foot-path at night, knowing of the location and condition of the well, and by reason of the darkness, or other cause, missed the path and fell into the well, he can not recover, for the reason that it was negligence to take the risk. *Bruker v. Town of Covington*, 69 Ind. 33 (35 Am. R. 202), and authorities there cited.

There is no statement in the complaint of the distance from the path to the well; no statement that either of the parties knew or were ignorant of its existence. If we are to assume that it was so far from the path that the boarder, who usually pursued that way to the house, did not or could not see it,

 Firestone v. The State, *ex rel.* Liggett.

then we may also assume that the railroad company could not reasonably apprehend that any necessity existed for guarding against any one straying so great a distance from the path into the well.

The averment that the appellee, "without any negligence on his part, accidentally passed a short distance away from said path, in the night time, as aforesaid, and fell into said well," without an averment that he was not aware of the location and condition of the well, does not rebut the presumption that he was not cognizant of both, and if he knew of the situation of the well, no matter how careful he was to avoid it, he made the attempt to do so at his own risk. *Riest v. City of Goshen*, 42 Ind. 339; *President, etc., v. Dusouchett*, 2 Ind. 586; *Bruker v. Town of Covington*, *supra*, and cases cited.

The judgment is reversed, with costs, with directions to the court below to sustain the demurrer to the complaint.

Filed Feb. 13, 1885.

No. 11,137.

FIRESTONE v. THE STATE, EX REL. LIGGETT.

MORTGAGE.—Foreclosure and Sale.—Rights of Senior Mortgagee.—Subrogation.

—A senior mortgagee, or one who has acquired his rights by subrogation, can claim no right to money realized by foreclosure of a junior mortgage and sale thereon, remaining after satisfaction of the decree. His remedy is to foreclose the senior mortgage. Such surplus money goes to the mortgagee by section 1104, R. S. 1881.

From the Marshall Circuit Court.

A. C. Capron, for appellant.

J. D. McLaren and *H. Corbin*, for appellee.

FRANKLIN, C.—Appellant owned certain real estate, which he mortgaged to secure a loan of money. He afterwards sold it, subject to the mortgage, to appellee Liggett, she assuming in the deed, and agreeing to pay off the mortgage, as a part of the consideration for the land; she then executed notes

Firestone v. The State, *ex rel.* Liggett.

and a mortgage upon the land to appellant for the deferred payments for the land. She failed to pay anything on the senior mortgage, and failed to pay the notes and satisfy the mortgage she had executed to appellant. Suit was commenced upon the senior mortgage against appellant and appellee Liggett. Appellant made a partial payment on that mortgage and procured a dismissal of the suit. Suit was then commenced on the junior mortgage. A judgment and decree of foreclosure were rendered, and the property was sold for more than enough to pay the junior mortgage; the surplus was paid into court and was in the hands of the clerk, and both these parties were claiming the surplus. The clerk refused to pay it out until it was determined to which it belonged. Appellee Liggett commenced this action against the clerk and his bondsmen to recover such surplus.

The clerk answered for himself and his bondsmen, that he held the money, and brought it into court to be determined to whom it belonged, and asked to have appellant made a party, and that he and appellee be required to interplead, and that it be determined to whom the money belonged, which was done accordingly.

Appellant demurred to the complaint, which was overruled. He then answered by a denial, and claiming the money, and filed a cross complaint, setting up the facts constituting his claim to the money. Demurrers were sustained to the second paragraph of the cross complaint, and also to a supplemental cross complaint.

There was a trial by the court and a finding for the plaintiff. Over a motion for a new trial, judgment was rendered for the plaintiff. The following assignment of errors has been made in this court:

1st. The complaint does not state facts sufficient to constitute a cause of action.

2d. Error in sustaining motion to strike out parts of answer.

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3d. Error in sustaining motion to strike out parts of cross complaint.

4th. Error in overruling motion to strike from the files demurrer to cross complaint.

5th. Error in sustaining demurrer to second paragraph of cross complaint.

6th. Error in sustaining demurrer to amended supplemental cross complaint.

7th. Error in rendering judgment without a reply to answer.

8th. Error in ordering the money paid to relatrix.

9th. Error in overruling motion for a new trial.

Appellant admits in his brief that the first specification of error is not well taken, and that the second and third are immaterial; they are, therefore, considered as waived.

The fourth had as well been waived, for the motion is not made a part of the record by bill of exception or order of the court, and can not be considered.

The seventh specification is also admitted not to be well taken, and the eighth is too general, and might as well have been admitted not to be well taken.

The ninth is overruling the motion for a new trial. The reasons therein stated for a new trial, that the finding is not sustained by the evidence, and is contrary to law, can not be considered in the absence of the evidence, which is not in the record.

The reasons, that the court sustained the demurrers to the second paragraph of the cross complaint, and the supplemental cross complaint, are not proper reasons for a new trial; they constituted no part of the trial, and, according to the practice, are not considered in determining upon the motion for a new trial; but they are proper subjects for specifications in the assignment of errors, and as they are embraced in the fifth and sixth specifications, they will be considered there as correctly presented. These two specifications present the same question, and counsel have properly considered and discussed them both together.

The Farmers' Bank of Mooresville v. Butterfield.

Appellant, in his cross complaints, claims this surplus upon the ground that he had paid a part of the senior mortgage, and asks to be subrogated to the rights of the senior mortgagee to that extent.

The 1104th section of the R. S. 1881, which is the same as the 639th section, R. S. 1876, reads as follows: "And in all cases where the proceeds of sale shall be more than sufficient to pay the amount due and costs, the surplus shall be paid to the mortgage debtor, his heirs or assigns."

This statute gives appellee a legal right to this surplus, and before appellant can overcome appellee's legal right thereto, he must show in himself a good cause of action in equity. He has attempted to do that by seeking through subrogation to foreclose the senior mortgage upon this fund, instead of upon the land, to the extent of his payment on the senior mortgage.

If he possesses any such rights, in order to make a good complaint, he must base it upon the senior mortgage, and make it a part of his complaint by an exhibit of a copy or the original, which he has not done in either the second paragraph of the cross complaint or his supplemental cross complaint to which the demurrer was sustained, for which reason, without naming others, there was no error in sustaining the demurrers to these pleadings.

There was no error in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed. Nov. 19, 1884. Petition for a rehearing overruled April 25, 1885.

No. 11,543.

THE FARMERS' BANK OF MOORESVILLE v. BUTTERFIELD.

MORTGAGE.—Release.—Notice.—Where a mortgagee, without payment, releases his mortgage upon the record thereof merely to enable the mort-

100	229
125	19
100	299
150	90
100	229
158	515

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gagor to mortgage the same lands to A. for a loan, with the agreement that, as between the parties, it shall remain in force, if B. takes a subsequent mortgage with notice of the facts, the first mortgage will bind as to him and be a lien prior to his mortgage.

EQUITY.—*Trial by Jury.*—*Answers to Interrogatories.*—*Practice.*—Where a cause in equity is submitted to a jury, the finding is only for the information of the court, and a motion for judgment upon answers to interrogatories, notwithstanding a general verdict, is improper.

SAME.—There is no error in submitting to a jury questions of fact in a cause in equity, where the record shows that the court did this only for information, and afterwards made a finding for itself.

SAME.—*Instructions.*—In such case, instructions to the jury should not be general as in a suit at law, but should be only such as relate to the determination of the questions of facts submitted.

SUBROGATION.—*Mortgage.*—*Priority.*—A purchaser of land which is subject to a mortgage, who pays off an older mortgage, is entitled by subrogation to set it up and foreclose it as a lien prior to the later mortgage.

MORTGAGE.—*Consideration.*—An extension of time, granted in consideration of the execution of a mortgage, constitutes the mortgagee a purchaser for value.

NOTICE.—*Agency.*—A purchaser of land for value, who, nearly five years prior to his purchase and while acting as agent for another in a different transaction, learns of the existence of a mortgage lien upon the land, is not chargeable as a purchaser with such notice.

SAME.—*Release of Record.*—*Presumption.*—A release of record presumptively destroys the lien of a mortgage, and notice of the existence of the debt secured thereby does not charge any person with notice of the continued existence of the mortgage.

From the Morgan Circuit Court.

G. W. Grubbs and M. H. Parks, for appellant.

F. P. A. Phelps, J. H. Jordan, G. A. Adams and J. S. Newby, for appellee.

BEST, C.—Alfred Harvey and wife, on the 1st day of April, 1874, executed a mortgage upon the real estate in the complaint described to Eli Harvey, his father, to secure eight notes of \$646 each, payable annually on and after the 25th of December, 1876. This mortgage was duly recorded, and on the 9th day of January, 1877, Eli Harvey released it of record by the following entry:

The Farmers' Bank of Mooresville v. Butterfield.

"I hereby certify this mortgage is released by payment in full. January 9th, 1877. ELI HARVEY.

"Attest: W. G. GARRISON, R. M. C."

On the 16th day of February, 1877, Alfred Harvey and wife executed a mortgage upon said land to the Dundee Mortgage and Trust Company to secure a loan of \$2,400, with a portion of which he paid the first three notes embraced in his father's mortgage. Prior to August 19th, 1881, Alfred Harvey became indebted to the appellant, the Farmers' Bank of Mooresville, in the sum of \$4,000, for which it held his notes with his father as surety, and on that day the payment of said sum was extended six months, and to secure the same Alfred made his note with his father and James A. Hadley as his sureties, and he and his wife also made a mortgage upon said land to secure said note. On the 13th day of October, 1881, Alfred Harvey and his wife conveyed said land to the appellant, in consideration of which the appellant surrendered its note of \$4,000 and assumed to pay the mortgage of \$2,400 executed to the Dundee Mortgage and Trust Company. Prior to this time Eli Harvey endorsed to the appellee the first two notes still held against Alfred, and subsequently he endorsed to him as collateral security the remaining three notes, and on the 19th day of November, 1881, the appellee brought this action against Alfred Harvey, his wife, and the appellant, to foreclose the mortgage made by Alfred and wife to Eli Harvey.

The complaint consisted of five paragraphs. A demurrer, for the want of facts, was overruled to the second, third and fourth paragraphs, and an answer was filed. A cross complaint of four paragraphs was also filed. The first sought to quiet the appellant's title. The second sought the foreclosure of a prior mortgage executed to the school fund, which the appellant had been compelled to pay. The third sought the foreclosure of the Dundee mortgage, which the appellant had paid, and the fourth sought the foreclosure of appellant's mortgage. A reply in denial of appellant's an-

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swer and an answer in denial of the cross complaint completed the issues.

A jury was empanelled, over the appellant's objection, and a great many interrogatories submitted by both parties were answered. A motion by appellant for judgment in its favor upon the answers of the jury to the interrogatories was overruled, and the court found that the appellee was entitled to a foreclosure of the mortgage as to the first two notes, and against him as to the others, subject, however, to the mortgage made to the Dundee Mortgage and Trust Company, and rendered judgment accordingly. A motion for a new trial was overruled, and these various rulings are assigned as error.

The second, third and fourth paragraphs of the complaint were substantially alike, and aver, in substance, that said mortgage was released of record simply for the purpose of enabling Alfred Harvey to negotiate the loan of \$2,400 with the Dundee Mortgage and Trust Company, with an agreement that such mortgage should remain a continuing security for the payment of said notes until said Alfred should execute a second mortgage upon said land to secure said note, which he agreed to do upon demand; that such mortgage has not been executed, nor have the notes been paid, and that the appellant, at the time it took its mortgage, and at the time it received a conveyance of said land, had actual notice of such facts and knew that said mortgage remained a subsisting security for the payment of said notes.

The release of the mortgage under the circumstances stated did not operate to extinguish it, but simply to cancel the record of its existence, and thereafter it remained in force as an unrecorded mortgage. *Etzler v. Evans*, 61 Ind. 56.

The notion of appellant, that the mere act of cancelling the record operated as an extinguishment of the mortgage, and that such lien, if any, as Eli Harvey thereafter had, grew out of and depended upon the agreement of Alfred to execute another mortgage, can not be sustained, and we, therefore,

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pass the question as to whether or not such agreement is within the statute of frauds.

The entry of satisfaction operated as an extinguishment of the mortgage as to all who had no notice of its continued existence, but as to such it continued a lien notwithstanding such entry. These paragraphs were, therefore, sufficient, and the demurrer properly overruled.

The motion of appellant for judgment in its favor upon the answers of the jury to interrogatories was properly overruled, as such motion is unauthorized on the trial of an equitable cause by the court. Such motions are only entertained when a cause is tried, and a general verdict, with answers to interrogatories, is returned by the jury. Section 547, R. S. 1881; *Louthain v. Miller*, 85 Ind. 161.

The appellant also insists that the court submitted the cause to a jury for trial, and that such action was erroneous. An examination of the record leads us to a different conclusion. Many interrogatories were submitted to the jury, but as this was done, as the record recites, for the information of the court, and as the court made its finding as is usual in equitable cases, we can not say that the cause was submitted to and tried by the jury. The practice in such cases does not contemplate the submission of the issues to the jury, but only questions of fact involved in the issues, and where nothing more than this is done, no error has been committed. *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515.

The instructions asked by appellant were properly refused, for the reason that they embraced the law as applicable to all the issues in the case, and were not limited to such rules as would have enabled the jury to determine the questions of fact submitted to them. In such case the court may properly refuse general instructions, as the jury have nothing to do with applying the law to the facts.

The remaining question is whether the evidence supports the finding. The uncontradicted testimony shows that Eli Harvey, before he conveyed the land to Alfred, executed a

The Farmers' Bank of Mooresville v. Butterfield.

mortgage upon a portion of the land to the State to secure a loan of school funds, and that after the appellant purchased the land, it paid \$240, the amount then due upon such mortgage. This payment, under these circumstances, subrogated the appellant to the rights of the State under this mortgage, and as it was the first lien upon the land, the appellant was entitled to its foreclosure as against the appellee. The finding that the appellee was entitled to a foreclosure subject only to the Dundee mortgage, was, therefore, clearly contrary to the evidence.

The only disputed question of fact is whether or not the appellant, at the time it accepted its mortgage, and at the time it purchased the land, had notice of the continued existence of the appellee's mortgage. The extension of time granted in consideration of the execution of the mortgage constituted the appellant a purchaser for value. *Gilchrist v. Gough*, 63 Ind. 576.

This fact rendered it incumbent upon the appellee to prove that the appellant, when it received its mortgage, had notice of the continued existence of the appellee's mortgage. The only notice claimed to have been given was such as was given by Alfred Harvey to John A. Taylor, cashier of appellant, at the time the Dundee mortgage was executed, and such as was given by Eli Harvey to Robert R. Scott, a director and member of the finance committee of appellant, who transacted the business of accepting the mortgage and purchasing the land.

At the time the Dundee mortgage was executed, John A. Taylor was its agent, and to him Alfred Harvey applied for the loan. Taylor knew of his father's mortgage, and that Alfred desired the loan to pay upon the debt. He informed Alfred that he could not obtain the loan unless his father would release his mortgage and advised him to get it done. This was done and the loan obtained. The known purpose of Alfred in obtaining the loan was perhaps sufficient to charge Taylor with notice that the entire debt was not paid, but there is not one word in the evidence tending to show

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that Taylor knew that the mortgage was a continuing security for the unpaid portion of the debt. Indeed, the record shows the contrary. In answer to this question, "State whether or not there was anything said about said debt from you to Eli Harvey remaining unpaid, in the same conversation with said John A. Taylor, cashier," to which Alfred answered: "Taylor said I could make a second mortgage from myself to Eli Harvey for the balance of my debt remaining unpaid to him if we wished to; that that would have to be done by agreement among ourselves, meaning Eli Harvey, myself and wife." This was all that was ever said to Taylor about the residue of the debt or the release of the mortgage, and it is manifest that he was neither informed, nor understood, that the mortgage, notwithstanding such contemplated release, was to remain a subsisting security for the unpaid portion of the debt. It rather appears that he understood that the lien of this mortgage was to be released, and a new lien created to secure the unpaid portion of the debt by the execution of a new mortgage.

Aside from this, Taylor was not acting for appellant and such information as he acquired in this conversation, occurring as it did nearly five years before the execution of appellant's mortgage, in no wise bound it. *White v. Fisher*, 77 Ind. 65 (40 Am. R. 287); *Foulks v. Reed*, 89 Ind. 370.

Again, such information can not possibly charge the appellant with notice of the existence of such mortgage, in view of the fact that Alfred Harvey, at the time the mortgage was made and the deed accepted, informed Robert R. Scott, who transacted the business for appellant, that there was no mortgage upon the land other than appellant's and the Dundee mortgage.

Eli Harvey testified as follows: "Have known Scott thirty or forty years. We talked about Alfred's business; that he had bought my farm, and how it was secured. This was in 1880 or 1881, before Christmas. I told him I had some of the notes. He just observed, 'Has not Butterfield got some

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of these notes?" " Again he testified, that after the crash came Scott said " Hasn't Mr. Butterfield some of those notes? I said yes." This testimony, the appellee contends, shows notice of the continued existence of such mortgage. The last conversation occurred after the execution of the appellant's mortgage, and it does not appear that the first did not. If, however, both occurred before, they fail to show such notice. It will be borne in mind that Alfred testified that he assured Scott at the time he took the mortgage, that there was no mortgage upon the land other than the Dundee mortgage, and it is not disputed that Scott, before accepting such mortgage, examined the record and knew that the appellee's mortgage had been released. In view of these facts, the mere statement of Eli Harvey that he talked with Scott and informed him that he had sold his land to Alfred Harvey, and how it was secured, does not show notice to Scott that after the release the mortgage continued to secure the unpaid portion of the debt. Nor does the fact that he was informed that some of the notes were unpaid charge him with notice that a mortgage which he knew had been released continued to secure them. The debt may exist without the mortgage, and as the release of record presumptively destroys the lien, notice of the existence of the debt in such case does not charge any person with notice of the continued existence of the mortgage. In addition to this Eli Harvey, in response to questions propounded to him by the court, testified: " I don't think I ever had any talk with Taylor about the second mortgage. I don't think I told Scott anything about the second mortgage. I never talked with any of the bank officers about the mortgage, or that the old one should stand until the new one was made."

This statement must be taken in connection with the other statements of the witness, and, when thus considered, they utterly fail to show that any notice was given the appellant of the continued existence of this mortgage at the time the appellant accepted its mortgage, and as there was no other evidence tending to establish such fact, it follows that the find-

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ing was not supported by the evidence, and that the court, for this reason, erred in overruling the motion for a new trial. The judgment should, therefore, be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to grant a new trial.

Filed Feb. 14, 1885. Petition for a rehearing overruled April 25, 1885.

 No. 10,292.

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100	237
147	670

CONTRACT.—*Damages.*—*Remoteness.*—In a suit to recover for the value of a table-rake to be attached to a reaper, a counter-claim, alleging that by the contract of sale the plaintiff agreed to adjust the same to the defendant's reaper so that he could properly harvest a crop of his wheat, known by the plaintiff to be then growing, that the plaintiff could not and did not do so, whereby the defendant, being unable to procure another machine, was compelled to use it to avoid greater loss, whereby he lost 80 bushels of his wheat, of the value, etc., is bad on demurrer, the damages being too remote.

COSTS.—*Recoupment.*—*Counter-Claim.*—Suit in the circuit court on a contract for the purchase of a machine by the defendant. Answer, that the plaintiff failed so to adjust the machine as agreed, whereby the defendant suffered loss, etc. The plaintiff recovered less than \$50.

Held, that the answer, though not a counter-claim in form, was such in fact, within the meaning of section 591, R. S. 1881, and as it might be presumed that the claim was reduced below \$50 by reason thereof, the plaintiff could recover costs.

PARTIES.—*Principal and Agent.*—*When Agent May Sue in his Own Name.*—An agent, selling property for and by authority of his principal, on credit, and having accounted to and satisfied his principal therefor, may sue the purchaser in his own name.

From the Elkhart Circuit Court.

H. D. Wilson and *W. J. Davis*, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellees.

COLERICK, C.—The appellees sued the appellant for the price of a table-rake and attachments for a reaper. The complaint consisted of three paragraphs. The first averred

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that they had on the 1st day of July, 1881, sold and delivered the rake and attachments to the appellant for \$100, one-half of which sum he promised to pay on the 1st day of October, 1881, and for the other half execute his note payable on the 1st day of October, 1882, with interest; that he had refused to comply with his said promise, and that by reason thereof said sums are due and remain unpaid, etc. The second averred the sale and delivery of said property for \$100 upon the appellant's promise to pay one-third of the price in cash on the 1st day of October, 1881, and to execute his notes for the residue, one for one-half thereof, payable on the 1st day of October, 1882, and the other for the balance, payable on the 1st day of October, 1883, both with interest and attorney fees. The third was the common count for property sold and delivered.

The appellant filed an answer of three paragraphs. The first was a general denial. The second averred that the appellees were not, but that Aultman, Miller & Co. were, the real parties in interest. The third, as a partial answer to the cause of action stated in the third paragraph of the complaint, averred, in substance, that on the 1st day of July, 1881, Aultman, Miller & Co., who manufactured the rake and attachments mentioned in said paragraph, through the appellees, as their agents, sold the same to the appellant, and agreed to adjust the same to a reaper he then owned, so as to enable him to properly cut and save forty acres of wheat which the appellees knew were then growing upon his farm, in consideration of which he promised to pay them \$65 two years from that time; that said Aultman, Miller & Co., though often requested, did not adjust said rake and attachments to said reaper, nor could they do so, nor could the appellant do so himself, or procure any one else to properly adjust the same, so as to properly cut and save his wheat, in consequence of which he was damaged \$50. Wherefore, etc.

The appellant also filed a counter-claim, in which he averred, in addition to the facts alleged in the third paragraph of his

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answer, that when the appellees failed to adjust said rake and attachments, the appellant's wheat was ripe, and as appellant could get no other machine, and had no other means with which to cut said wheat, he was compelled to use his reaper with said rake and attachments improperly adjusted, or suffer a greater loss; that in its use a part of the wheat was not cut, but broken down, and a portion that was cut was lost and could not be saved; that in consequence of the use of said machine, so improperly adjusted, the appellant lost eighty bushels of wheat of the value of \$80. Wherefore, etc.

A demurrer was sustained to this pleading, and a reply was filed to the second and third paragraphs of the answer. A trial was had, and a verdict in favor of the appellees for \$40, with answers to interrogatories, was returned. A motion for a new trial, and a motion to tax the costs of the action to the appellees, were overruled, and judgment was rendered upon the general verdict. These last rulings are assigned as error.

The demurrer to the counter-claim was, we think, properly sustained. The loss of the appellant's wheat caused by the voluntary use of a machine improperly adjusted must be borne by himself, as the consequences did not necessarily arise from a breach of the agreement to properly adjust the rake and its attachments. The damages to be recovered must be the natural and proximate consequences of the breach of the agreement. 2 Greenl. Ev., section 256; 1 Sedgw. Dam., p. 66; *Loker v. Damon*, 17 Pick. 284; *Cline v. Myers*, 64 Ind. 304; *Prosser v. Jones*, 41 Iowa, 674. In the case last cited, the defendant agreed to give the plaintiff \$100 for a threshing machine and thresh his wheat at any time within four days after notice. This he failed to do, and the plaintiff whose wheat was unstacked, and who was unable to get another machine to thresh it, brought an action to recover for such injury as it afterwards sustained, and the expense of stacking it, but it was held that such damages were too remote to be recovered in an action for the breach of a contract. This case seems precisely in point, and announces, as we

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think, the law correctly upon this question. The damages sought to be recovered are not the direct and immediate consequences of the breach of the agreement, and, therefore, there was no error in sustaining the demurrer.

The motion for judgment upon the answers of the jury to the interrogatories proceeds upon the ground that they show that the appellees are not the real parties in interest. The facts found bearing upon this question are these: That Aultman, Miller & Co., of Akron, Ohio, manufactured the rake and attachments, and through the appellees, as agents at Goshen, Indiana, sold them to the appellant; that the same belonged to said company at the time of sale, and that the appellees have settled with said company and accounted for said property. These facts are the only facts found bearing upon this question, and they do not, as we think, show that Aultman, Miller & Co. are the real parties in interest, within the meaning of the statute requiring every action to be prosecuted in the name of such party. These facts show that this property at the time of sale belonged to Aultman, Miller & Co., and that the sale was made by said company through the appellees as agents, but it does not, therefore, follow that the appellees may not maintain an action in their own name for the price. If the appellees were answerable to Aultman, Miller & Co. for the price of the articles, and the fact that they had accounted for them would seem to imply such liability, they were entitled to maintain an action in their own names for the price. Story Agency, section 398. The facts found are not inconsistent with such liability, and, therefore, can not control the general verdict. The motion was properly overruled.

It is next insisted that the court erred in overruling the appellant's motion to tax the costs of the action to the appellees, because they recovered less than \$50. That portion of section 591 of the statutes of 1881, applicable to this question provides that, "In actions for money demands on contract commenced in the circuit or superior courts, if the

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plaintiff recover less than \$50, exclusive of costs, he shall pay costs, unless the judgment has been reduced below \$50 by a set-off or counter-claim pleaded and proved by the defendant, in which case the party recovering judgment shall recover costs." This is such action, and the recovery was less than \$50. The judgment was not reduced below that amount by a set-off, because none was pleaded, and the question arises whether the matter pleaded in the third paragraph of the answer constitutes a counter-claim. The fact that it was not pleaded in the form of a counter-claim makes no difference, if the facts averred really constitute such claim. *Poag v. LaDue*, 7 Ind. 675. The statute defines a counter-claim as "any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages." R. S. 1881, section 350. The undertaking to adjust the rake and attachments as averred was connected with the cause of action sued upon, and any damages sustained by its breach tended to reduce the amount of the appellees' claim, and, therefore, this was unquestionably a counter-claim. Under this plea, a claim for more than \$50 might be reduced below that amount, and as the evidence is not in the record, we can not say that the claim sued upon in this action was not so reduced. If such was the fact, the appellees were entitled to costs, and as the contrary does not appear, we can not hold that the motion was incorrectly overruled.

This disposes of all the questions in the record, and as we are of opinion that no error was committed, the judgment should be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Oct. 18, 1884. Petition for a rehearing overruled April 25, 1885.

The City of Kokomo *et al.* v. Mahan.

No. 11,625.

THE CITY OF KOKOMO ET AL. v. MAHAN.

CITY.—Street.—Sidewalks.—The word “street” embraces sidewalks, and the statute requiring compensation for damages resulting from a change of grade applies to changes in the grade of a sidewalk.

SAME.—Change of Grade.—Compensation for Damages.—Injunction.—Where a change in the established grade of a street occasions serious injury to an adjoining property owner, he may maintain an injunction to restrain the municipal authorities from proceeding until the damages are assessed and tendered as provided by statute.

SAME.—Authority to Improve Streets.—Right to Collect Assessment for Cost of Second or Subsequent Improvement.—The authority to improve streets is a continuing one, and the corporate authorities may make a second or subsequent improvement, and collect the expense thereof from the adjoining lot owners.

SAME.—Discretion of Corporate Authorities.—Injunction.—The municipal authorities are invested with the power of determining when a second improvement is necessary, and the courts can not control this discretionary power by injunction.

SAME.—Change of Grade.—Character of Injury Resulting.—An averment in a complaint, that “the plaintiff will sustain damages, occasioned by the change of grade, in the sum of \$—,” is not sufficient to entitle the plaintiff to an injunction, because it does not show that the damages will be of a serious character.

SAME.—Constitutional Law.—Consequential Damages Resulting from Change of Grade.—Consequential injuries resulting from a change in the grade of a street do not constitute a taking of private property for a public use within the meaning of the Constitution, and a property owner can only claim damages for such injuries in cases where the right to damages is given by statute.

From the Howard Circuit Court.

J. W. Kern, J. C. Blacklidge, W. E. Blacklidge and B. C. H. Moon, for appellants.

M. Bell and W. C. Purdum, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that he is the owner of a lot in the city of Kokomo, fronting on Taylor street; that on the 12th day of August, 1874, the common council of the city legally adopted an ordinance for the construction of a sidewalk in front of appellee's lot; that

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it was provided in the ordinance that the sidewalk should be constructed upon the grade established by the civil engineer; that the engineer, pursuant to the provisions of the ordinance, did establish the grade, and that the sidewalk was constructed upon the grade established, and in accordance with the requirements of the ordinance. It is also alleged that the common council of the city, on the 25th day of June, 1883, adopted an ordinance providing for the construction of a new sidewalk, and so changing the grade as to raise the sidewalk from four to six inches above the former grade; that the city has awarded a contract for the improvement of the sidewalk under the provisions of the ordinance of June, 1883, and that the contractor has entered upon the work, and will proceed with it unless enjoined. The allegations upon the subject of the injury, which it is asserted will result from the proposed change of grade, are as follows: "Plaintiff further avers that if said work is allowed to proceed, and he is compelled to pay therefor under said ordinance, he will be greatly damaged, to wit, in the sum of \$75.56. Plaintiff further avers that he will sustain damages occasioned by said proposed change of grade in the sum of \$——, unless said defendants are restrained and enjoined from proceeding therewith."

The statute requiring compensation to be assessed and tendered in cases where a change is made from an established grade applies to sidewalks. It would be a perversion of the language of the statute to hold that it applies only where the grade of the part of the street used for passage by horses and vehicles is changed. Such a construction would defeat the purpose of the statute. It is too well settled to admit of debate, that the term "street" in its ordinary acceptation includes sidewalks, and that it is always given that meaning unless the language with which it is associated changes or restricts its signification. *State v. Berdette*, 78 Ind. 185 (38 Am. R. 113); 2 Dillon Munic. Corp. (3d ed.), section 780, n. 1.

We have no doubt that in a proper case the property owner may maintain an injunction to restrain a municipal corpora-

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tion from making a change of grade in a street without first causing the damages to the property owner to be assessed and tendered him as the statute requires. The owner is not bound to wait until the improvements are completed, and then sue for damages. This is expressly decided in *City of Logansport v. Pollard*, 50 Ind. 151, and the decision is in harmony with many other decisions upon kindred subjects.

The authority to improve streets is in its nature a continuing one, and is not exhausted by directing one or more improvements, but may be exercised as often as the public welfare demands. *Macy v. City of Indianapolis*, 17 Ind. 267; *Goszler v. Corporation of Georgetown*, 6 Wheat. 507. This settled principle necessarily leads to the conclusion that the municipal authorities may collect the cost of a second or subsequent improvement from adjoining lot owners, and so it has been often decided. *City of Lafayette v. Fowler*, 34 Ind. 140; *Yeakel v. City of Lafayette*, 48 Ind. 116; *Williams v. Mayor, etc.*, 2 Mich. 560; *McCormack v. Patchin*, 53 Mo. 33; S. C., 14 Am. R. 440; *Gurnee v. City of Chicago*, 40 Ill. 165; *Municipality, etc., v. Dunn*, 10 La. An. 57; 2 Dillon Munic. Corp. (3d ed.), section 780.

The municipal authorities are invested with the discretionary power of determining when improvements are required, and the question of when they are necessary can not be determined by the courts. *Macy v. City of Indianapolis, supra*; *Smith v. Corporation of Washington*, 20 How. (U. S.) 145. Judge DILLON, in speaking of the power to improve streets, says: "It may, therefore, be exercised from time to time, as the wants of the municipal corporation may require. Of the necessity or expediency of its exercise, the governing body of the corporation, and not the courts, are the judges." 2 Dillon Munic. Corp. (3d ed.), section 686. This is in harmony with the general principle, so often declared by this and other courts, that a court will not interfere with the exercise of a discretionary power conferred upon another tribunal, or upon a public officer. *Mayor, etc., v. Roberts*, 34 Ind. 471.

It is evident that the fact that the city is threatening to collect the cost of the second improvement from the appellee adds nothing to the force of his complaint, for, as the authorities we have referred to clearly establish, the city had a right to do this, and it would be a manifest absurdity to affirm that a party can be enjoined from doing, in a lawful way, what he has full legal authority to do.

The only legal injury (if it be proper to call the injury alleged a legal one) shown is that described in the averment, reading thus: "The plaintiff will sustain damages occasioned by the change of grade in the sum of \$——." This is very far from such a showing as will authorize interference by injunction.

It has been repeated again and again, that injunction is the strong arm of the law, and will be granted only when the injury shown is of a serious character. The equity rule was that it would only be granted when the injury was irreparable, but this rule has been much modified by our statute and our decisions. *Erwin v. Fulk*, 94 Ind. 235. The extent of the injury is not here shown, and if we were authorized to fill the blank left by the pleader, we should be compelled to presume that the extent of his injury was one dollar, and no more, and to insert that sum in the blank. Where a party is required to affirmatively show a value, or show the amount of a sum of money, his failure to do so requires the court to presume that the amount or value was the lowest that could reasonably be affixed to the property or money. *Broom L. Max.* 576; 2 *Greenl. Ev.*, section 129a. We can not presume that so slight a change in the grade as that described in the complaint will do the appellee any harm; for aught that appears it may be of positive benefit to him. Indeed, the presumption is against him, for it is an elementary rule that public or municipal officers will be presumed to have done their duty, and not to have encroached upon individual rights.

The injunction can not be sustained upon the ground that the regrading of the street was a seizure of private property.

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The cases are very harmonious upon the point that a change in the grade of a street is not the seizure of private property for a public purpose. They are far too numerous for citation, and we refer to a very few of the many: *Macy v. City of Indianapolis*, *supra*; *City of Lafayette v. Spencer*, 14 Ind. 399; *City of Delphi v. Evans*, 36 Ind. 90 (10 Am. R. 12); *City of Lafayette v. Bush*, 19 Ind. 326; *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135); Cooley Const. Lim. (5th ed.) 252, 673, and authorities n. 1.

The right to compensation for damages resulting from a change of grade exists only by virtue of statute. The case made by the complaint is, therefore, wholly unlike the case of the assertion of a right to appropriate private property for a public use. The utmost that can be justly claimed in such a case as this is, that the public corporation is proceeding to make a change of grade without assessing and tendering the consequential damages resulting from the change, in accordance with the provisions of the statute upon the subject.

The statute which gives a right to compensation in cases where there is a change of grade necessarily implies that there must be an injury resulting. It would be a solecism to affirm that compensation must be paid where there is no injury or loss to be compensated. The language of the statute is that the grade shall not be changed "until the damages occasioned by such change shall have been assessed and tendered." R. S. 1881, section 3073. This clearly implies that where there is no injury there need be no assessment. The cases of *Sims v. City of Frankfort*, 79 Ind. 446, *vide* p. 454, and *City of Columbus v. Storey*, 33 Ind. 195, fully sustain our conclusion that in such a case as this the plaintiff can not have relief by injunction without at least showing substantial damages or an injury of a serious character.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

Filed Feb. 17, 1885.

Curme, Dunn & Co. et al. v. Rauh et al.

No. 11,622.

CURME, DUNN & CO. ET AL. v. RAUH ET AL.

FRAUD.—Chattels.—Bona fide Purchaser.—A purchaser of chattels for value without notice, who buys from one who bought with intent not to pay, takes a good title against the original seller. *Aliter*, if he had notice of the intended fraud.

SAME.—Evidence.—In replevin by the seller against a mortgagee of the buyer, based on the theory that the buyer did not, when he purchased, intend to pay, the plaintiff introduced as evidence tending to show the buyer's insolvency a balance sheet made by the buyer, showing the state of his business, also his list for taxation, both made shortly before the purchase.

Held, that these were admissible.

Held, also, that the belief of the defendant when he took his mortgage, that the mortgagor was solvent, was immaterial and incompetent as evidence in his behalf.

PRACTICE.—Discretion.—Admission of Evidence after Argument has Begun.—The court may, in its discretion, admit further evidence after argument has begun.

SAME.—Evidence.—Lost Writing.—Upon sufficient proof of the loss of a writing, its contents may be proven by parol.

SAME.—Impeachment of Witness.—Contradictory Statements.—Section 508, R. S. 1881, authorizes the impeachment of a witness by proof of his contradictory statements, when he has answered that he does not recollect having made them.

EVIDENCE.—Opinion.—The opinion of a mortgagor of chattels as to the value thereof may be shown by proof of the fact that he offered the same goods absolutely in payment of the mortgage debt.

BONA FIDE PURCHASER.—Chattel Mortgage.—A mortgagee of chattels which had been purchased by the mortgagor with intent not to pay for them, who takes his mortgage without notice to secure a pre-existing debt, without any new consideration, can not hold them against the seller, because he is not a *bona fide* purchaser.

SALE OF CHATTELS.—Delivery.—Condition.—Upon the sale of goods for cash, a delivery in expectation of immediate payment is conditional, and until payment or waiver thereof no title passes.

From the Wayne Circuit Court.

W. A. Bickle and C. H. Burchenal, for appellants.

D. W. Comstock and H. U. Johnson, for appellees.

BICKNELL, C. C.—This was an action by the appellants

100	247
126	44
100	247
147	372
100	247
157	680

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against the appellees to recover the possession of personal property, alleged to be unlawfully detained by the defendants from the plaintiffs.

The defendants answered by a general denial and a special plea of property in themselves. The plaintiffs replied in denial of the special plea.

The issues were tried by a jury who returned a verdict for the plaintiffs against the defendants Bickle and Dougan, and in favor of the defendants Curme, Dunn & Co. Curme, Dunn & Co. were a corporation. A motion by the defendants Bickle and Dougan for a new trial was overruled; judgment was rendered on the verdict; Bickle and Dougan appealed.

Three errors are assigned, but the only one discussed in the appellants' brief is the following: 3. The court erred in overruling the motion for a new trial. The first and second reasons for a new trial are, that the verdict is contrary to law, and is not sustained by sufficient evidence.

The goods had been purchased by Curme, Dunn & Co. from the plaintiffs, who claimed that the sale was for cash, and that, the money not being paid, no title passed to Curme, Dunn & Co. They also claimed that the sale was voidable because the goods were bought with the design not to pay for them. The defendants claimed that the sale was on thirty days' time, and that the defendants Bickle and Dougan were *bona fide* purchasers for value.

The undisputed facts were as follows: On the 15th of August, 1883, Curme, Dunn & Co., dealers in leather, at Richmond, Indiana, wrote to the appellees, at Dayton, Ohio, as follows: "What have you to offer in the way of heavy steers for harness; also, heavy cows and heifers, light No. 1 hides, forty to fifty-five pounds? Send us price."

On the 16th of August, 1883, the appellees replied, stating prices and offering to sell, but making no mention of credit.

On the 20th of August, 1883, Curme, Dunn & Co. wrote to the appellees as follows: "You may ship us fifty light prime No. 1 hides, forty to fifty pounds; fifty light bulls, such

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as you mention in your letter of August 16th. Get through bill of lading."

On the 23d of August, 1883, the appellants wrote to Curme, Dunn & Co., enclosing their bill and the bill of lading of the hides ordered as above, and offering to sell more, and stating in a postscript: "You can remit us amount bill; we will not draw."

On the 27th of August, 1883, Curme, Dunn & Co. wrote to the appellees, stating that the above shipment had just arrived, and ordering a further shipment of fifty heavy cow and heifer hides.

On the 29th of August, 1883, the appellees replied, enclosing bill of lading of said last mentioned fifty hides, and soliciting further orders; and on the 3d of September, 1883, the appellees again wrote, offering more hides and requesting a remittance for the two bills aforesaid.

The hides were received by Curme, Dunn & Co., at Richmond, the first shipment on the 25th of August, 1883, and the second shipment on the 31st of August, 1883. Curme, Dunn & Co., stopped doing business on the 1st of September, 1883.

On the 30th of August, 1883, Curme, Dunn & Co. mortgaged all their property, real and personal, to the appellants Bickle and Dougan, to secure the payment of two notes, payable one day after date, one of them to Dougan for \$12,000, dated June 20th, 1882, and the other to Bickle for \$10,000, dated June 14th, 1882, and each bearing eight per cent. interest. The mortgage recited that these notes were given for money loaned, and provided that on default of payment of either of the notes, the mortgagees might immediately take possession of all of the mortgaged property, and should thereby be invested with the title to all of it, with power to sell the same, or continue the business, at their option, until fully repaid.

On the 5th of September, 1883, Curme, Dunn & Co. gave a cognovit, authorizing a confession of judgment upon said

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notes and mortgage without relief from valuation or appraisement laws.

At the September term, 1883, of the Wayne Circuit Court, judgment was rendered upon said cognovit in favor of said Bickle for \$10,698.29, and costs, and in favor of said Dougan for \$12,810.40, and costs. In the meantime, on the 1st of September, 1883, Bickle and Dougan had taken possession under the mortgage of all the mortgaged property, including the hides in controversy, which had been put in process of manufacture into leather.

On the 5th of September, 1883, after demand made upon Bickle and Dougan, and refusal, this suit was brought; it was tried on the 17th, 18th and 19th days of October, 1883.

It appeared that a prior mortgage had been executed by Curme, Dunn & Co. to Bickle and Dougan on the 20th of August, 1883, and that the only difference in the contents of the mortgages was that the second mortgage embraced a horse and wagon which were not included in the first mortgage. The first mortgage had not been recorded. There was evidence that this mortgage had been lost, and parol evidence was given of its contents.

There was some conflict in the testimony as to the indebtedness of Curme, Dunn & Co., and as to the value of their property, and their ability to pay their debts.

Arthur Curme testified that after the date of the first order for the hides, and before the hides were sent, an agent of the appellees called at his office, who, on being informed by Curme that he expected thirty days' time to pay for the hides, replied, "That will be all right." But that agent denied that any such conversation had been held at that interview.

The appellant Bickle testified: "At the time of the taking of the mortgage I did not know that Curme, Dunn & Co. had bought any goods with intent of not paying for them; at the time we took the mortgage I had no knowledge that they had any fraudulent intent."

The appellant Dougan testified: "At the time the mortgage

was executed I did not know that Curme, Dunn & Co. had purchased any property they did not intend to pay for. I had no notice, knowledge or belief that they executed the mortgage to defraud any one; I did not accept the mortgage with intent to defraud or cheat any of the creditors of Curme, Dunn & Co."

The following are the rules of law applicable in this case:

The attempted sale of personal property by a party without title transfers no title, as where a naked bailee undertakes to sell the subject of the bailment. *Wolf v. Esteb*, 7 Ind. 448. Or where a thief undertakes to sell the property stolen. *Robinson v. Skipworth*, 23 Ind. 312; *Breckenridge v. McAfee*, 54 Ind. 141. So where the property is sold on condition that the title shall not pass until payment made. *Thomas v. Winters*, 12 Ind. 322; *Dunbar v. Rawles*, 28 Ind. 225; *Bradshaw v. Warner*, 54 Ind. 58.

In such cases, the owner of the property, the original vendor, may maintain replevin therefor against the vendee, or even against an innocent purchaser from the vendee for value, without notice. But where there is an absolute sale and delivery of personal property by the owner to the vendee, and the sale is merely voidable on account of fraud in the vendee, such vendee may transfer a good title by a sale made to a *bona fide* purchaser for value. *Claflin v. Cottman*, 77 Ind. 58. It is true fraud vitiates every transaction, yet fraud of the vendee in procuring a sale does not render the sale absolutely void, but makes it voidable only. The party defrauded may still affirm the sale, which he could not do if it were void. *Bell v. Cafferty*, 21 Ind. 411.

A purchase of goods, with a design of not paying for them, is such a fraud upon the vendor as will make the sale voidable. 1 Parsons Con. 569, 570; *Evansville, etc., R. R. Co. v. Erwin*, 84 Ind. 457.

The unqualified delivery and acceptance of possession complete the sale, and give the buyer the absolute rights of property and possession in the thing sold, though the price be un-

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paid and the buyer insolvent, unless, indeed, the whole transaction is vitiated by fraud. Blackburn Sales, 202. The party who claims as purchaser from a fraudulent vendee must be a *bona fide* purchaser for value. "A party who obtains the goods from the fraudulent purchaser, without notice of the fraud, in the usual course of trade,—that is, who gives value for them, makes advances upon them, incurs responsibilities upon the credit of them, or receives them in pledge for money or property loaned upon the strength of them,—may hold the goods against the vendor, being a *bona fide* purchaser." 2 Hilliard Torts, 80. Fraud is a question of fact for the jury. *Rhodes v. Green*, 36 Ind. 7. It may be deduced from facts, incidents and circumstances, which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design. 2 Kent Com. 484.

Applying the foregoing rules to the evidence, we think the verdict was not contrary to law, and as there was evidence tending to sustain it, it can not be disturbed.

There was evidence tending to show that here was a sale for cash which was not paid; there was evidence tending to show that the goods were bought with the design of not paying for them, and that Bickle and Dougan were not *bona fide* purchasers for value.

The next question arising upon the motion for a new trial, and discussed by the appellants, is, that "the court erred in refusing to allow the defendants to prove by said William A. Bickle his understanding and belief at the time of the execution of the mortgage by Curme, Dunn & Co., as to the solvency and means of said Curme, Dunn & Co."

We think there was no error in this. There was no charge of fraud against Bickle and Dougan. Arthur Curme had already testified in behalf of the appellants: "I believed the assets were ample to pay for all indebtedness." The opinion of Mr. Bickle as to the solvency of Curme, Dunn & Co., at the time of the execution of the mortgage, was immaterial and incompetent. If the sale was conditional only, then

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Curme, Dunn & Co., whether insolvent or not, could not make a valid title to Bickle and Dougan. If the sale was absolute, and yet voidable for the fraud alleged, then, if Bickle and Dougan gave value for the goods, without notice of that fraud, their title would be good, whether Curme, Dunn & Co. were insolvent or not.

The next alleged errors of law occurring at the trial are that the court allowed the plaintiffs to introduce in evidence a certain balance sheet, entitled, "Balance sheet Curme, Dunn & Co., May 2d, 1883," and also erred in permitting it to be introduced after the evidence was closed and the argument had commenced. It is within the discretion of the court to admit an item of evidence after the argument has commenced. *Beagles v. Sefton*, 7 Ind. 496. The writing admitted was executed by Curme, Dunn & Co., in the course of their business, and purported to show their financial condition on the 2d of May, 1883. We think it was competent.

The appellants also urge, as error, the admission of the tax list, marked "Exhibit A, J. H. K." This was a tax list, headed "Form No. 3." "Statements of Corporations," etc. It was required to be made under section 89 of the act of March 29th, 1881, concerning taxation. It was signed and sworn to by Arthur Curme, the president of Curme, Dunn & Co., and purported to show the actual value of the capital stock and personal property of the company. We think this was competent. *Painter v. Hall*, 75 Ind. 208.

The next errors alleged and discussed are, that the court permitted proof of the execution and contents of the mortgage, dated August 20th, 1883. We think there was sufficient proof of the execution and loss of this instrument to authorize proof of its contents.

It is next objected that the court erred in permitting the witness, Robbins, to contradict the witness Curme by proof of statements formerly made by him, different from those made on the present trial, and in refusing to strike out the testimony of the witness Robbins. The appellants' counsel

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refer to *Mendenhall v. Banks*, 16 Ind. 284, as authority to show that when a witness says he has no recollection of making a statement, you can not prove that he did, because there is nothing to contradict, but this old rule has been changed by statute. Acts Spec. Sess. 1861, p. 33. There was no error in these matters.

Appellants next complain of the ruling of the court permitting Curme to testify that after Bickle and Dougan had taken possession of the property under the mortgage, the company offered to Bickle and Dougan to turn over to them all of the property in payment of their claim. This was certainly competent; it was an act of theirs tending to show their estimation of the value of the property.

The next error alleged and insisted on is that the court refused to permit the defendants to prove by Arthur Curme the purpose for which Curme, Dunn & Co. ordered and bought the hides in controversy. Curme had already testified as to that; he had stated that when the goods were ordered the intention was to pay for them and to continue business right along. There was no available error in this ruling.

The next error insisted upon is that the court erred in refusing to permit the defendants to prove by William Krass the statement made to him by Arthur B. Curme immediately after the conversation between him and the plaintiffs' representative, and while said representative was still on the premises, and near enough to hear such statement. But this ruling was right, because the evidence shows that this statement was not made in the presence or hearing of said representative.

The only other reasons for a new trial which are discussed in the appellants' brief are, that the court erred in giving and refusing instructions.

The first instruction refused by the court is as follows:

"1. If you believe from the evidence that Wm. A. Bickle and John B. Dougan in good faith loaned the money set out in the mortgage set out in this case, and thereafter took said

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mortgage to secure the payment of said money, and if you believe that Curme, Dunn and Co., for the purpose of paying said Bickle and Dougan, or to enable said Bickle and Dougan to make their said money, turned over and delivered to said Bickle and Dougan all the personal property then in the visible possession and control of said Curme, Dunn & Co., and if said Bickle and Dougan, in good faith and without any knowledge or information of any fraud, or any other way in and by which said Curme, Dunn & Co. acquired said property, took and accepted said property to pay their said debt in good faith as aforesaid, said Bickle and Dougan, under the circumstances before detailed, would be *bona fide* purchasers for a valuable consideration."

This instruction was correctly refused, as already stated in this opinion. Bickle and Dougan could not be *bona fide* purchasers of the goods in controversy without giving something for them, or incurring some liability or making some advances upon the strength of them.

The second instruction refused is not mentioned in the appellants' brief; the objection to its refusal is, therefore, regarded as waived.

The third instruction refused contains the following statement: "The vendor, to avoid a waiver of the condition of the sale, must either refuse to deliver the goods without a performance of the condition, or he must make the delivery at the time qualified and conditional."

We think there was no error in refusing this. It is not necessary that the vendor should declare the condition in express terms at the time of the delivery; it is sufficient if the intent of the parties can be gathered from their acts and all the circumstances of the transaction.

Upon a sale presumed to be for cash, a delivery, with the expectation of receiving immediate payment, is not absolute, but conditional until payment is made, and where there is no waiver of the payment no title vests in the purchaser. 1 Benj.

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Sales, section 343. In the present case there were repeated demands for immediate payment by the appellees in their letters.

There are, among the instructions refused by the court, two, each of which is numbered 4, but only one of them is mentioned in the appellants' brief; it is as follows:

"4. If Curme, Dunn & Co. ordered the goods of the plaintiffs, and if the plaintiffs, after receipt of such an order, delivered the goods to the railroad company at Dayton, Ohio, for shipment to Curme, Dunn & Co., and at the time took bills of lading therefor, in which Curme, Dunn & Co. was named as consignee, and if the plaintiffs sent such bills of lading to Curme, Dunn & Co. along with the bills for the goods, then, under such circumstances, the delivery of the goods to the railroad company would be in legal effect a delivery to Curme, Dunn & Co., and *prima facie* the title to such goods then vested in that company." In the place of this instruction the court gave the following:

"No. 9. If the plaintiffs did business in Dayton, Ohio, and Curme, Dunn & Co. did business in Richmond, Indiana, and if Curme, Dunn & Co. ordered by letter said plaintiffs to ship to it at Richmond, Indiana, the property described in the complaint, and if thereupon said plaintiffs did so ship said goods, sending by letter to said Curme, Dunn & Co. the bill of lading therefor, and if nothing was said by either party as to the payment of the price, and if such goods were received by Curme, Dunn & Co., the burthen of proof to show that such delivery was not absolute, but was conditional, and that plaintiffs expected immediate payment, would be upon said plaintiffs." This ninth charge thus far, it will be observed, contained the whole substance of the said fourth charge requested by the defendants, and the court added thereto the following: "But such proof may be made by circumstances, and the jury should carefully look to all the circumstances in determining whether or not the plaintiffs made an unconditional delivery of such goods; and if the

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jury believe that said plaintiffs did not unconditionally deliver said goods, but expected pay therefor before the title passed, the jury would be warranted in finding that no title to said goods passed to said Curme, Dunn & Co., and that said Bickle and Dougan could acquire no title thereto by transfer from said Curme, Dunn & Co., but that the title is still in the plaintiffs." We think there was no error in thus refusing the defendants' fourth instruction, and giving the substance of it in said ninth instruction, with the additions above set forth.

The appellants claim, that here was a written contract, and that there could be no conditions unless they appeared in the writing, and that none could be discovered "by carefully looking into all the circumstances," and that it was the duty of the court to have told the jury that the sale was absolute, and that the delivery vested the title. But we can not agree to this. Whether the negotiation is by letter or by parol, if nothing is said about the time of payment and no usage is shown, the sale is presumed to be for cash, that is, on condition of immediate payment, and whether that condition is waived by a delivery of the goods is a question for the jury to be determined by the acts of the parties and all the circumstances of the case. In the present case the writings themselves show a demand for immediate payment.

The only other instruction given by the court, to which any specific objection is made in the appellants' brief, is the fifth, which is as follows :

"5. If Curme, Dunn & Co. obtained the property described in the complaint from the plaintiffs fraudulently, without any intention of paying for it, and afterwards transferred the same to the defendants Dougan and Bickle, and if before such transfer said Curme, Dunn & Co. were legally in debt to said Bickle and also to said Dougan, and if just after said Curme, Dunn & Co. obtained said property, said Curme, Dunn & Co. executed a mortgage to said Bickle and Dougan

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upon all their property and effects of whatever kind to secure the payment of such debts, and if afterwards said Curme, Dunn & Co. transferred all of said property embraced in such mortgage, including the property described in the complaint, and if such transfer was made without other consideration than to secure the payment of such debts, said Bickle and Dougan would not be purchasers of the property described in the complaint for a valuable consideration as against said plaintiffs, and plaintiffs may reclaim said property of them, although said Bickle and Dougan may have been ignorant that Curme, Dunn & Co. acquired the same from the plaintiffs by fraud."

We think this instruction was right. The objection made to it is that there was no evidence tending to show that Curme, Dunn & Co. bought the goods with the design of not paying for them, but we think there was evidence proper to be considered by the jury as tending to show such fraud.

We have now considered all the reasons for a new trial which are discussed in the appellants' brief.

The appellants make in their brief a general objection, that "the charges of the court from beginning to end are a gratuitous assumption of fraudulent conduct on the part of Curme, Dunn & Co., devoid of foundation and mischievous in effect and misleading to the jury." Upon such a general objection it is sufficient to say that in this we think the appellants are mistaken.

We find no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Jan. 28, 1885.

Dugle v. The State.

No. 11,953.

100	265
134	40

DUGLE v. THE STATE.

CRIMINAL LAW.—Arson.—Affidavit.—Description of Property Burned.—Where an affidavit, charging arson, describes the property destroyed as “a certain frame building, commonly called a stable,” it sufficiently indicates the purpose for which such building is, or is intended to be, used.

SAME.—Juror, Competency of.—Opinion as to Guilt or Innocence of Accused.—Statute Construed.—Under the second clause of section 1793, R. S. 1881, when a person, called as a juror in a criminal trial, has either formed or expressed an opinion as to the guilt or innocence of the defendant upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay merely, he may nevertheless, in the discretion of the court, be admitted to serve, provided the court is satisfied that he is able, notwithstanding such opinion, to render an impartial verdict in the cause; but where such opinion is based upon conversations with witnesses to the alleged offence, or reading reports of the testimony of such witnesses or hearing them testify, such person is absolutely incompetent to serve as a juror in such cause, if objection is made at the proper time.

From the Ohio Circuit Court.

J. S. Jelley, for appellant.

F. T. Hord, Attorney General, *G. E. Downey*, Prosecuting Attorney, and *W. B. Hord*, for the State.

NIBLACK, J.—This was a prosecution upon affidavit and information against Samuel Dugle, the appellant, for the crime of arson. R. S. 1881, section 1927.

So much of the affidavit as our attention has been specially called to is as follows:

“George Mapes swears that Samuel Dugle, * * * on or about the 29th day of May, A. D. 1884, did then and there, at and in said county of Ohio, and State of Indiana, unlawfully, feloniously, wilfully, purposely and maliciously set fire to, burn down and destroy, a certain frame building, commonly called a stable, the property of, and belonging then and there to, George Mapes, and then and there situate, and of the value then and there of one hundred dollars,” etc.

It was, and still is, claimed that the affidavit was insuffi-

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cient for its failure to aver the purpose for which the building burned was used, or intended to be used. Such an averment, however, in a charge of arson, is only required when necessary to indicate the character of the building burned, or other property similarly destroyed, and hence in this case would have been superfluous. Webster states the primary meaning of the word "stable" to be "a house, shed or building for beasts to lodge and feed in." Therefore, to call a building a *stable* sufficiently indicates the purpose for which it is, or is intended to be, used.

A trial resulted in a verdict of guilty as charged, in assessing a fine of \$50 against the appellant, and in sentencing him to the State's prison for the period of eight years.

When one Stopher, who served as a juror in the cause, was examined on his oath touching his qualifications as a juror, he answered, substantially: "I have both formed and expressed my opinion in the cause. I was present and heard a part of the trial of the defendant before the justice on the preliminary examination of this charge. I heard some of the witnesses testify at that trial and the argument of counsel, and it was from the sworn statements of witnesses on that trial that I made up my opinion, which has been both formed and expressed, as above stated. It would not, however, require additional evidence to remove the opinion I have formed under the circumstances as I have stated them, and I feel able, notwithstanding such opinion, to render an impartial verdict in the cause upon the law and the evidence."

The appellant thereupon challenged Stopher for cause, but the circuit court held him to be a competent juror, and hence overruled the challenge.

The second clause of section 1793, R. S. 1881, declaring what shall be good causes for challenge to a person called to serve as a juror in a criminal trial, reads thus:

"That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror state that he has formed or expressed an opinion as to

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the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumors or hearsay, and not upon conversations with witnesses of the transaction, or reading reports of their testimony, or hearing them testify; and the juror state on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case."

Under this provision of the statute, as well as some preceding statutory provisions, we have held that the competency of a juror, who had either formed or expressed an opinion upon the guilt or innocence of a defendant in a class of cases somewhat analogous to this, rested very much in the discretion of the *nisi prius* court, and within certain limits entirely in its discretion. *Hart v. State*, 57 Ind. 103; *Guetig v. State*, 66 Ind. 94 (32 Am. R. 99); *Stout v. State*, 90 Ind. 1; *Butler v. State*, 97 Ind. 378.

But we have never gone to the extent of holding that it is within the discretion of a *nisi prius* court to admit a person, over proper objection, to serve as a juror in a criminal cause, when he has either formed or expressed such an opinion from having heard witnesses testify in a preceding trial of the same cause, or from having read reports of the testimony of, or having had conversations with, witnesses to the transaction.

Our construction of the provision of the statute herein above set out is, that when a person, called as a juror in a criminal trial, has either formed or expressed an opinion as to the guilt or innocence of the defendant upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay merely, he may, nevertheless, in the discretion of the court, be admitted to serve as such juror, provided the court is satisfied that he is able, notwithstand-

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ing such opinion, to render an impartial verdict in the cause. But that where such opinion is based upon conversations with witnesses to the transaction constituting the alleged offence, or reading reports of the testimony of such witnesses, or hearing them testify, the person having so formed or expressed his opinion as to the guilt or innocence of the defendant is absolutely incompetent to serve as a juror in the cause, when a question is made, at the proper time, as to his competency in that respect. This construction is supported by *Brown v. State*, 70 Ind. 576, and results inevitably, as it seems to us, from the very terms and phraseology of the statutory provision in question.

It follows that the circuit court erred in admitting Stopher as a competent juror in the cause.

The judgment is reversed, and the cause remanded for a new trial.

The clerk will give the usual notice for the return of the prisoner to the custody of the sheriff of Ohio county.

Filed Feb. 10, 1885.

 No. 10,475.

THAYER v. BURGER ET AL.

100	202
130	552

100	262
169	75

HIGHWAY.—*Petition.*—*Words and Phrases.*—A petition for the vacation of a highway and the establishment of a new one, which states that "the same will affect lands owned by S. and T., as we believe said route will be of public utility," and that the vacation will "affect land owned by T. only," sufficiently complies with the statute requiring the names of the owners to be stated, and is sufficient.

SAME.—*Appeal.*—*Practice.*—Objections in such case to the sufficiency of the petition or to the report of viewers, if not made before the county commissioners, are waived.

VERDICT.—*Venire de Novo.*—*Practice.*—Defects in the form of a verdict are available only upon motion for a *venire de novo*.

From the Marshall Circuit Court.

H. Corbin and *J. D. McLaren*, for appellant.

A. C. Capron and *C. Richardson*, for appellees.

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COLERICK, C.—The appellees presented to the board of commissioners of Marshall county a petition for the vacation of a certain highway, and the establishment of a new one therein described. Viewers were appointed to view the same, and they reported favorably to the granting of the petition. A remonstrance was then filed by the appellant and others against the location of the proposed highway, on the ground of its alleged inutility, and that the appellant would be damaged if it was established. Upon the filing of this remonstrance the board appointed reviewers, who reported that the proposed highway would be of public utility, and that the appellant would be damaged in the sum of \$10 by its establishment, and thereupon an order was made by the board vacating the existing highway and establishing the new one, and directing the payment of the damages, so assessed, out of the county treasury. From this order the appellant alone appealed to the Marshall Circuit Court, where the proceeding was tried by a jury, and resulted in the rendition of a verdict in favor of the vacation and establishment of the respective highways in question, and assessing damages in favor of the appellant, upon which verdict, over motions for a new trial and in arrest of judgment, a judgment was rendered in accordance therewith.

The only errors assigned, that have been discussed by the appellant in his brief, assail the sufficiency of the petition, and the rulings of the court below in overruling the motions for a new trial, and in arrest of judgment.

The principal objection urged by the appellant to the sufficiency of the petition is, that it failed to set forth "the names of the owners, occupants or agents of the lands through which the highways proposed to be established and vacated" would pass. The petition was as follows:

"To the Commissioners of Marshall County, Indiana:

"The undersigned citizens, and residents and freeholders of North township, Marshall county, Indiana, six of whom reside in the immediate neighborhood of the highway herein-

Thayer v. Burger *et al.*

after mentioned, hereby petition your honorable body for the location and opening of a public highway, as follows:" (describing it.) "Said road to be thirty feet wide, and the same will affect lands owned by Daniel Seltenright and Bazil J. Thayer, as we believe said route will be of public utility. And we also petition for the vacation of all that part," etc. (describing the highway to be vacated). "Said change to affect land owned by Bazil J. Thayer only."

We think it appeared with sufficient certainty by the averments in the petition, that the only lands that would be affected by the location and vacation of the highways in question were those owned by the persons therein named, and hence that the provision of the statute requiring the names of such owners, occupants or agents to be stated in the petition was complied with. If the petition in that respect had been defective, as asserted by the appellant, the objection thereto for that cause should have been made by him before the board of commissioners. See *Crossley v. O'Brien*, 24 Ind. 325. No such objection was there made. It is made for the first time in this court.

The only other objection urged by the appellant to the petition is that the words "as we believe," which appear in the petition, above set forth, were used in connection with, and constituted a part of, the averment therein as to the ownership of the lands that would be affected by the highways proposed to be vacated and established, and that the use of those words in that connection so modified the averment as to render it insufficient. If the supposed objectionable words were used in that connection as asserted by the appellant, which is an erroneous assumption on his part, as they were evidently used in connection with the words immediately following them, still the petition was not, for that reason, rendered insufficient, as the statement of the petitioners in the petition, that they believed the asserted fact to be true, was equivalent to an unqualified assertion by them that it was true. See *Simpkins v. Malatt*, 9 Ind. 543; *State v. Ellison*,

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14 Ind. 380; *Curry v. Baker*, 31 Ind. 151; *Bonsell v. Bonsell*, 41 Ind. 476.

The appellant next assails the report of the viewers, and insists that it was defective and insufficient. The record fails to show that any objection to it was made by him either before the board of commissioners or in the court below, where the case was tried on its merits. It has been often held by this court that objections to such a report must be presented to the board, and if not there made they are waived. *Green v. Elliott*, 86 Ind. 53; *Lowe v. Ryan*, 94 Ind. 450; *Clift v. Brown*, 95 Ind. 53. On an appeal from the board of commissioners to the circuit court, in a case like this, the report of the viewers is, by force of law, and without any motion to that effect, vacated and set aside, whenever the cause is there tried on its merits. *Turley v. Oldham*, 68 Ind. 114.

The appellant also insists that the verdict was defective, because it failed to describe the proposed highway. If the verdict had been defective in form, as asserted by the appellant, the proper method of reaching the defect was by a motion for a *venire de novo*. See *Bosseker v. Cramer*, 18 Ind. 44.

No such motion was made. But the verdict was not defective. It could have been, and was, understood by the court, which is all the law requires. See *Daniels v. McGinnis*, 97 Ind. 549. By the verdict the jury found that it would be of public utility to have the proposed highway established and opened "as prayed for by the plaintiffs in their petition." In the petition the beginning, terminus, course, distance and width of the proposed highway were fully and accurately stated, and by the judgment of the court the highway, as established, was described as set forth in the petition. Even if the verdict was defective, as asserted by the appellant, in the respect named by him, the defect was cured by the judgment. See, as bearing upon this question, *Ruston v. Grimwood*, 30 Ind. 364; *Daggy v. Coats*, 19 Ind. 259; *Sidener v. Essex*, 22 Ind. 201.

The only reason urged by the appellant in this court in

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support of the motion for a new trial is, that the verdict was not sustained by sufficient evidence. The evidence, which is in the record, tends to sustain the verdict, and, therefore, we can not disturb it on the weight of the evidence.

This disposes of all the questions submitted for our consideration, and as there is no error in the record the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Jan. 28, 1885.

 No. 11,518.

COLLINS ET AL. v. COLLINS.

SUPREME COURT.—*Bill of Exceptions.*—*Apparent Omission of Evidence.*—Although the bill of exceptions concludes with the usual formula, "this was all the evidence given in the case," yet if, on the face of the bill, there is an apparent omission of evidence, the Supreme Court will not consider or decide any question which depends, for its proper decision, upon the evidence in the cause.

From the Delaware Circuit Court.

J. R. McMahan, T. J. Blount and C. B. Templer, for appellants.

W. Brotherton, R. S. Gregory and A. C. Silverburg, for appellee.

Howk, J.—This was a suit by the appellee, Anna V. Collins, against her husband, John Collins, under the provisions of sections 5132 to 5138, R. S. 1881, in force since September 19th, 1881, to obtain provision for the support of herself and her infant daughter in her custody. A large number of persons were made defendants to the suit, upon the ground that they were either indebted to the appellant John Collins, or had his property or money in their possession. The cause was put at issue and tried by the court, and a finding was

100	266
130	300
130	428
100	266
142	441
100	266
146	114
147	301
100	266
152	318

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made for the appellee, and over a motion for a new trial judgment was rendered accordingly.

The only questions discussed by the appellants' counsel in their argument of this cause are such as arise under the alleged error of the court in overruling their motion for a new trial. Two points are made by counsel in argument, namely : *First*. That the finding of the court was not sustained by sufficient evidence ; and, *Secondly*. That the amount of the allowance to appellee was excessive. Appellee's counsel make the point, however, that this court can neither consider nor decide these questions, because, they say, that although the bill of exceptions contains the usual statement, "this was all the evidence given in the cause," yet the bill shows upon its face that in fact it does not contain the evidence of all the witnesses who testified on the trial of the cause. The fact seems to be in full accordance with the statement of appellee's counsel. In three different instances, and as to three different witnesses, it is stated in the bill of exceptions, as the same appears in the transcript, that the witness "testified as follows," but the evidence of these three witnesses, be it much or little, is not set out in the bill of exceptions or elsewhere in the record of this cause. Appellee's counsel say in their brief that these three witnesses "did testify in the cause to facts material to the issues ;" that they "testified *in extenso*, and not one word of the testimony of any one of them appears in the record." This statement is not controverted by the appellants' counsel, but they claim that it is *dehors* the record ; and because the bill of exceptions contains the usual statement "this was all the evidence given in the cause," they further claim that this court must presume that the bill does not contain the evidence of the three witnesses, simply because they gave no evidence.

This claim of appellants' counsel, however, can not be sustained. This court has uniformly held that, although the bill of exceptions concludes with the statement "this was all the evidence given in the cause," yet, if it affirmatively appear

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that the bill does not contain all the evidence, the court will not consider and decide any question which depends for its proper decision upon the evidence. *French v. State, ex rel.*, 81 Ind. 151; *Shimer v. Butler University*, 87 Ind. 218; *Fellenzer v. Van Valzah*, 95 Ind. 128. With the statement in the bill of exceptions as to three different witnesses, that the witness "testified as follows," we can not presume that the witness did not testify, and that, for this reason, his testimony was omitted. If the three witnesses did not testify on the trial, the appellants ought to have had their bill of exceptions corrected before they brought their appeal to this court. The only questions they discuss here, and the only causes for which they ask the reversal of the judgment below, depend wholly for their proper decision upon the consideration of all the evidence given in the cause. We can not say from the record that it contains all the evidence, and, therefore, we must decline to consider the questions discussed by appellants' counsel, or to disturb the finding and judgment of the trial court.

The judgment is affirmed, with costs.

Filed Feb. 17, 1885.

No. 11,743.

THE SCHOOL TOWN OF ROCHESTER v. SHAW.

PLEADING.—*Complaint.*—*School Teacher.*—*Employment by School Town.*—*Contract.*—A complaint against the school town of R., alleging the employment of the plaintiff by the defendant to teach school and a breach of the contract, is sufficient without alleging employment by the trustees of such school town, or that the town was incorporated, or that there was a board of trustees in said town.

SAME.—*Account.*—In such case, a paragraph of complaint founded on an account is not bad on demurrer for that reason.

NEW TRIAL.—*Misconduct of Attorney in Argument.*—*Instruction.*—A citizen of M. county was engaged to teach school in F. county, and subsequently brought suit to recover for services. On application of the plaintiff, the venue of the cause was changed from F. county to M. county, where, upon the trial of the cause, the plaintiff's attorney in

100	308
127	402
100	368
134	344
100	208
160	440

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the closing argument, over the objection of the defendant, urged the jury to "stand by your own citizen," and also, over objection and against the admonition of the court, told the jury that "the school trustees, pupils and citizens of F. county are trying to disgrace and oppress a citizen of M. county," and other language calculated to prejudice the jury against the defendant. There was a verdict for plaintiff.

Held, that this was such misconduct as entitled the defendant to a new trial.

Held, also, that the court could not, in its instructions, cure the error.

From the Marshall Circuit Court.

M. L. Essick, G. W. Holman and J. D. McLaren, for appellant.

M. A. O. Packard, O. M. Packard, B. D. Crawford and E. Myers, for appellee.

FRANKLIN, C.—Appellee sued appellant upon a contract to teach school and for services rendered in teaching school. The complaint consisted of two paragraphs, one on the contract and one on account. A demurrer to each was overruled. The defendant answered by a denial and a special defence. There was a trial before a jury; verdict returned for the plaintiff for \$104.25. A motion for a new trial was overruled, and judgment was rendered upon the verdict.

The errors assigned are the overruling of the demurrer to each paragraph of the complaint, and the overruling of the motion for a new trial.

The complaint substantially alleges that the plaintiff had the necessary license to teach school; that she was employed by the defendant to teach school; that she commenced so teaching under said employment; that she fully discharged all the duties and conditions on her part in accordance with the terms of said agreement; that before the expiration of the term of her said contract, the defendant discharged her, without any cause on her part.

The first objection to this complaint is that it does not show that the plaintiff was employed by the trustees of the school town. The complaint alleges that she was employed by the defendant, the school town. As the corporation can only act

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by and through the trustees as its officers and agents, it is sufficient to charge the employment by the corporation, and prove it to have been made by and through its regularly constituted authorities.

It is also objected that the complaint does not show that the town was incorporated, or that there was a board of trustees in said town. There is nothing in either of these objections.

It is further objected that as the second paragraph of the complaint is only on an account, such liability can not be created against the corporation, without a special contract with the trustees, and that the demurrer ought to have been sustained to that paragraph. There might have been a special employment by the trustees without fixing the terms of the contract, though such would be very unusual and unbusiness-like, or valuable services may have been rendered and received under a contract without complying with its terms. And in such cases a recovery may be had on an account. We think the complaint sufficient, and there is no error in overruling the demurrer to it, or either paragraph thereof.

In the motion for a new trial twenty-nine reasons are stated. Counsel have at considerable length presented and discussed nearly all of these reasons, but we do not think it advisable or profitable in this case to follow counsel in their discussions; the greater part of the reasons stated are in relation to the admission and rejection of evidence, and the giving of instructions to the jury.

The twenty-fourth and twenty-fifth reasons complain of error in the court, and misconduct of the plaintiff's counsel in the closing argument to the jury by making certain declarations and representations. According to the bill of exceptions in the record, the following is the matter complained of: "Be it remembered that after the evidence in this cause had been closed, that upon the argument of said cause to the jury, * * * counsel for the plaintiff, in the closing argument to the jury, used the following language (which was not within

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the issues, was wholly foreign and irrelevant, and which was intended to prejudice the minds of the jury against the cause of the defendant, and which language was wholly unbecoming), to wit: 'The discharge of the plaintiff from the Rochester school had a political significance and oppression. The trustees of that school must have a victim upon which to visit the sins of the school, and they sought out and made her the victim. Arthur M. Ward was kept in the school for the purpose of tormenting this woman; he was a man not fit to be kept there; he was a mean villain, and the board was guilty of miserable deception. Gentlemen of the jury, stand by your own citizen.' And the counsel for the defendant called the counsel, the said * * *, to order, and requested the court to stop him and compel him to desist, and the court did warn the counsel that those things were not within the issues, and not in the evidence; but, disregarding the court, the said counsel continued, and the court permitted him to continue, without further warning; and said counsel for plaintiff, turning to counsel for defendant, said: 'I warn the counsel not to disturb me, you want to take exceptions, don't you? The school trustees, pupils and citizens of Fulton county are trying to disgrace and oppress a citizen of Marshall county.' And in refusing to stop, reprimand and prevent the counsel from using said language in the hearing of the jury, the counsel at the time excepted, and was given time to file this bill of exceptions."

From the declarations of plaintiff's counsel, as contained in the foregoing bill of exceptions, it appears that plaintiff was a citizen of Marshall county. She had engaged to teach school in Rochester, Fulton county, where she commenced this suit for an alleged violation of such engagement, and upon her application the venue was changed to the county of Marshall, where the case was tried.

When it is alleged as a fact in the bill of exceptions signed by the judge, that the foregoing remarks were made by plain-

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tiff's counsel in his closing argument to the jury, when there was no opportunity for answer, "with the intention to prejudice the minds of the jury against the cause of the defendant," we think that it is shown that plaintiff's counsel was guilty of misconduct in the trial of the cause; and when he persisted in making such remarks after objection from opposing counsel, and being warned by the court to desist, he was guilty of gross misconduct, and when the court permitted him to continue such remarks after being so warned by the court to desist, it erred in not compelling him to stop.

The attempt of the court afterwards, in its instructions, to remove all erroneous impressions that may have been created upon the minds of the jury by such declarations by plaintiff's attorney, came too late; whatever impressions may have been made by such declarations already had a lodgment in the minds of the jury, and we can not say that if made they would be entirely removed by instructions from the court. The declarations were improper and well calculated to produce the "intended" prejudice against the defendant and its cause of defence.

Rudolph v. Landwerlen, 92 Ind. 34, was a case in which the facts did not show any greater misconduct of the attorney than is shown in this case, and for which the judgment in that case was reversed. In the decision in that case it is said: "In the case before us, if the first departure of counsel might have been rendered harmless, the second outbreak could not have been inadvertent, but was without any excuse, and it can only be regarded as a purposed violation of the admonition of the court and an attempt to gain an advantage in a court of justice by a known wrong. If it must be allowed that such a going outside of the facts for the purpose of appealing to prejudice ought not to have weight in the determination of any matter, it deserves the strongest condemnation when resorted to for the purpose of influencing the verdict of a jury; and when counsel make such departures, it must be under-

stood that they do so at the risk of losing any advantage thereby gotten."

In that case, when the second outbreak occurred, the court did stop the counsel, and tried to correct the wrong immediately, without relying upon subsequent instructions for that purpose, and still this court reversed the judgment for the reason of the misconduct of the attorney. In this case the court placed no check or barrier to the attorney's continuing and repeating the misconduct.

The argument of counsel to a jury necessarily proceeds under the supervision of the court, and where counsel abuse their necessarily broad privileges in argument, they should not be permitted to reap any advantage gained by such abuse. When counsel so far forget themselves, and the dignity of their profession, as to travel outside of the evidence and the record in the case, in argument to the jury, and wantonly and virulently attack the character of the opposing party and witnesses, attempt to browbeat opposing counsel, and disregard the orders of the court, they ought not to complain if a new trial be granted on account of their misconduct, especially when this occurs in the closing argument, when there is no opportunity to answer. Such misconduct has a tendency to prevent a fair trial.

The court erred in overruling the motion for a new trial. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to grant a new trial, and for further proceedings.

Filed Feb. 12, 1885.

VOL. 100.—18

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No. 11,717.

HUMPHRIES v. DAVIS.

DESCENTS.—Adoptive Child.—Adoptive Parents.—Where a child, adopted by a husband and his wife jointly, dies, without children or their descendants, the owner of land inherited from the adoptive mother, the surviving husband and adoptive father inherits such land, and it does not descend to the natural mother.

SAME.—Status.—The rights of descent flow from the legal status of the parties, and where the status is fixed the law supplies the rules of descent.

SAME.—Statutes.—Construction of.—A statute introducing a new right, or creating a new status, is not to be construed as a separate and independent law, but is to be considered as forming part of one uniform system, and, in giving it effect, it is proper for the courts to look to other statutes, to the common law, to the principles of natural justice, to the source from which the new right was derived, and to the object intended to be accomplished by the Legislature.

From the Montgomery Circuit Court.

G. W. Paul and J. E. Humphries, for appellant.

E. C. Snyder, P. S. Kennedy and S. C. Kennedy, for appellee.

ELLIOTT, J.—Isaac Davis and his wife, Jessie Davis, adopted, as their child, Emily Davis, the natural daughter of Elizabeth Davis, now Elizabeth Krug. About a year after the adoption of the child, Mrs. Jessie Davis died, leaving as her only heirs her husband and her adopted daughter, and within a year the adopted daughter also died. The natural mother claimed two-thirds of the land which her child inherited from Mrs. Jessie Davis, and conveyed part of it to the appellant. This claim the surviving husband resists, and the question is, Who shall have the land, the surviving husband, or the natural mother? We deem it one of the important factors in this legal problem, that the land vested in the child solely by virtue of its legal relationship to Mrs. Davis, and not by virtue of its natural relationship to any one. The title vested in the adopted child by force of law, and not because of any inheritable right springing from a natural kinship.

In the case of *Davis v. Krug*, 95 Ind. 1, this element was

100	274
124	43
124	438

100	274
128	341

100	274
132	300

100	274
144	629

100	274
150	233

100	274
167	22

100	274
171	707

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considered one of importance, and it was held that property derived by the child from one of the persons by whom it had been adopted went to its other parent by adoption, rather than to its natural mother. We limit our decision in this instance, as it was limited in the former case, to the property derived from one of the adopting parents by inheritance, and confine it to the question of the rights of the natural mother as against the surviving parent of the deceased child, who became such by law, and not by nature; but, in thus limiting our decision, we do not mean to intimate that if the property came to the adopted child otherwise than by inheritance from kinsmen of its own blood, the adoptive parents would not inherit to the exclusion of the natural mother. The case to which we have referred is decisive of this controversy, but as it has been vigorously assailed, we have, at the earnest solicitation of counsel, again examined the question.

The equity of the case is with the surviving husband and against the natural mother who gave up her child, sundering all maternal ties, and suffering a stranger to take a mother's place. The husband, who enabled his wife to acquire or preserve her property, has infinitely stronger claims than the natural mother, who cast aside her child. Rules of law are intended to secure justice, and justice requires that the husband who has maintained the wife should be preferred to the mother of a child which was the child of his wife only by adoption. Equity is natural justice, and natural affection and natural right make a strong equity in the husband's favor. Suppose that the claim were urged by a surviving wife, instead of the husband, in such a case as this, would it then be doubted that the wife, whose joint labor and care had aided in accumulating the property, should be preferred to the natural mother who was a stranger, both in blood and in law, to the person who was the source of title? Must the wife be put off with a paltry share to make room for a stranger who has no claim upon the bounty of the husband, nor, of right, any place in the husband's affections? The principle which rules

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in the one case must govern in the other. We have shown the equity of the case for the reason that equity has a potent influence in the construction of statutes. Courts always endeavor to so construe a statute as to make it an instrument of justice. As HOBART, C. J., long ago said, "equity must necessarily take place in the exposition of statutes." Courts can neither wrest words from their plain meaning, nor violate the spirit of a statute upon their own notions of natural justice; but, where the statute is general in its terms, and not clear and definite in its letter and scope, courts may give it such a construction as will make its operation just and beneficial. To aver the contrary would be to assume that the Legislature did not intend to make a just law. There is nothing in the statute before us requiring us to declare that the rights of a surviving husband shall yield to the rights of the natural mother of a child which he had joined with his wife in adopting. When the statute is read by the light of the civil law from which its principles are borrowed, and is considered in connection with the general principles of the law of descent and the statutes upon that subject, it becomes clear that its construction must be that which natural justice requires.

The common law made no provision for the adoption of children, and we can get no light from that source. *Krug v. Davis*, 87 Ind. 590; *Ross v. Ross*, 129 Mass. 243; S. C., 37 Am. R. 321. The Roman law made provision for adopting children, and the provisions of that law, as revised and changed by Justinian, formed a complete system. Sandars' Justinian, 103, 105, 109. The adopted child was, as that law declared, "assimilated, in many points, to a son born in lawful matrimony." That law preserved to the child all the family rights resulting from his birth, and secured to him all the family rights produced by the adoption. Sandars' Justinian, 105. The Supreme Court of Louisiana, in discussing this subject, says: "And the effect was such, that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person."

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At another place the court said: "Now, when in an enabling or permissive statute, the Legislature has used a word so familiar in its ordinary acceptation, and so well known in the sources of our law, does it become the judiciary to say that it has not such meaning, because the law-giver has not himself expressly defined the sense in which he intended the word should be taken?" It is also said: "The law-giver ought not to be supposed ignorant of this state of things, or to use a term in a more restricted sense than it was formerly known to our laws."

Vidal v. Commagere, 13 La. Ann. 516. It is true that the remarks of the court apply with rather more force to a State which has adopted the civil law than to one where the common law prevails, but they, nevertheless, declare a general principle which has a place in all enlightened systems of jurisprudence, for it is established law that where a rule is borrowed from another body of laws, courts will look to the source from which it emanated to ascertain its effect and force. *City of Valparaiso v. Gardner*, 97 Ind. 1. If, as the civil law so fully provided, a child of the adoptive son stood in the relation of grandchild to the adoptive father, then the son himself must stand as the child of that father. The statute of Massachusetts makes some exceptions as to the child's status, and it was held that the adoptive child as to property of the adoptive father stood as a natural child, save in so far as the exceptions declared otherwise, the court saying: "The adopted child, in this case, therefore, in construing her father's settlement, must be regarded in the light of a child born in lawful wedlock, unless the property disposed of by the settlement falls within one of the exceptions." *Sewall v. Roberts*, 115 Mass. 262.

In *Ross v. Ross*, *supra*, it was said, in reviewing the cases of *Schafer v. Eneu*, 54 Pa. St. 304, and *Commonwealth v. Nancrede*, 32 Pa. St. 389: "But the opinion in each of those cases clearly recognizes, what indeed is expressly enacted in the statute, that, as between the adopted child and the adopting father, the child has all the rights and duties of a child, and the capacity to inherit as such." Elsewhere in the opin-

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ion from which we have quoted, it is said: "It is the rights, duties and capacities, arising from the event which creates a particular status, that constitute the status itself and afford the best definition of it." It is true that the law can not do the work of nature and create one a child who by nature is a stranger, but it may fix the legal status of the child. While, therefore, the Pennsylvania court is right in saying that the law can not make the child a natural one, the conclusion that the status of the adoptive child to the adoptive father may not be fixed by law does not follow by any means. The law may declare the status, and from the status courts must determine the correlative rights of parent and child thus created. One of the acutest of legal minds and clearest of writers says: "There are certain rights and duties, with certain capacities and incapacities to take rights and incur duties, by which persons, as subjects of law, are variously determined to certain classes. The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a condition or status which the person occupies, or with which the person is invested." 1 Austin Juris. 41.

In *Burrage v. Briggs*, 120 Mass. 103, this doctrine was carried very far, for it was there held that the status of the adoptive child was such that it would take as a child under a residuary clause of the adoptive father's will, where the specific legacy had lapsed. It was decided in *Lunay v. Vantyne*, 40 Vt. 503, that as to the right to recover for services there was no difference between an adoptive and a natural child.

In the case of *Barnes v. Allen*, 25 Ind. 222, it was held that the adoptive child was the heir of the adoptive father in the degree of a child, and was entitled to inherit from him all the estate of which he could deprive his wife. This is impliedly an assertion that as to the adoptive parent the status of the adoptive child is, for the purpose of inheriting from the father, that of a natural child. The court, in *Isenhour v. Isenhour*, 52 Ind. 328, said: "The law can endow an adopted child with all the rights in property of a natural child, but it has

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not the power to make him the natural child of any woman but his natural mother." It was also said, in speaking of the adoption by the husband, instead of by both the husband and wife, that "If he had been adopted by both, perhaps he might have been held as a child 'by a previous wife,' within the proviso in section 24 of the act regulating descents." The cases of *Krug v. Davis, supra*, and *Davis v. Krug, supra*, very explicitly affirm that as to the adoptive parents and their property, the status of the person adopted is that of a natural child.

In a recent text-book it is said: "And the rights of the parent by adoption are treated substantially as those of a natural parent." Schouler Dom. Rel., section 232. This author thus interprets our case of *Barnhizer v. Ferrell*, 47 Ind. 335: "An adopted child usually inherits from the adopting parent, and *vice versa*; but otherwise as to collateral kindred." Schouler Dom. Rel., section 232, n.

In the case referred to, the court correctly laid down the law as to the status of the child, but, misled by confusing a natural relation with a legal status, was carried to an erroneous conclusion. The failure to give just importance to the difference between a legal status and a natural relation is the error that invalidates the reasoning in that case, for the court there affirmed the existence of the status, but stripped it of the incidents inseparably annexed to it, and this was a plain violation of the logical principle that where properties necessarily inhere in the thing, they can not be separated from it. Having affirmed the existence of the legal status, the properties inseparably connected with it should also have been affirmed as governing facts in the case. That we are right in our view is evidenced by the summing up of the result of the reasoning in that case. "In such case," said the court, in speaking of the adoption by the father only, "the child might inherit from the adopted father, but not from his wife. He would have an adopted father, but not an adopted mother. He would have no right as her child." This, surely, is a full

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recognition of the status of the adopted child, and, if it be, then the correlative relation of father must also exist. What was decided in *Hole v. Robbins*, 53 Wis. 514, is shown in the concluding statement of the opinion, which reads thus: "In the case at bar, the property which is claimed by the adopted parents came to the child from the natural parents, and justice would seem to demand that it should descend to them or their kindred upon his death; and there being nothing in the statutes concerning the adoption of children which clearly indicates an intention on the part of the Legislature to change the order of descent from the adopted child, we must, upon authority and principle, hold that the property descends according to the general law regulating the descent of real estate." It will be readily perceived that the decision from which we have quoted can not be authority to prove that the natural heirs shall take, to the exclusion of a surviving adoptive parent, property which the child acquired solely by virtue of his legal status, or that the status of the adoptive child is not, as to all legal incidents, the same as that of a natural child.

The point of the decision in *Wagner v. Varner*, 50 Iowa, 532, is, that where a father adopted two children of his daughter, and afterwards died, leaving no will, the children so adopted inherited from him as his own children, and inherited, also, the share of their deceased mother. The court said: "By the act of adoption these children became in a legal sense the children of John Bumer." This is an explicit declaration of the legal status created "by the event" of adoption.

In *Keegan v. Geraghty*, 101 Ill. 26, the court held that the adoptive child could only inherit from the adoptive parents, and could not inherit from the lineal or collateral heirs of the parents, and this ruling, it is clear, does not controvert the proposition that the status is the correlative one of parent and child. The case of *Reinders v. Koppelman*, 68 Mo. 482, decides that the status of parent and child exists, but that the right of inheritance is, by force of the statute, vested only in the child, thus narrowing the whole question to the one statute.

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The authorities we have discussed unite in affirming that the status of an adoptive child for all legal purposes, and as to the property inherited from an adoptive parent, is that of a natural child. This supplies a premise which guarantees the conclusion, that the adoptive father must inherit from it property which came to it from his wife and the child's adoptive mother. It is, indeed, the only logical conclusion deducible from the premise granted. If there is a child, there must be a parent. The status of child necessarily imports that of parent. From this conclusion there is no escape unless logic is defied or disregarded. Parent and child are correlative terms, the one relation implies the other. It is logically impossible to conceive the relation of child without in the same conception implying that of parent. To affirm that there is a child is to affirm, upon axiomatic principles, that there is a parent, for one correlate implies the existence of that of which it is the correlative. The logicians thus state this logical principle: "Where the terms are correlative in the same subject, if one is predicated of the subject the other must be also." If, then, we predicate of the subject, property inherited from an adoptive mother, the status child, we must predicate of the same subject the correlative status, father.

It is, as we have seen, the legal status of the person respecting the subject that determines his legal rights. To again quote from Austin: "The law of persons is the law of status or conditions. * * * The rights and duties, capacities and incapacities which constitute a status or condition, are commonly considerable in number and various in kind. * * * Such are the rights and duties, capacities and incapacities of husband and wife, parent and child, guardian and ward." 2 Austin Juris. 709, 711. As the status of the surviving husband and adoptive father is that of father, his interest in the land which the deceased child held in virtue of the rights vested in it by adoption is that of a father, since it is of that property, as the subject, that the status of parent and child

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is predicated. This is a just as well as a logical result. It is not to be presumed that the Legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent, nor that they meant to thrust out the surviving husband and father for the benefit of a person that was a stranger to the ancestor who was the source of title.

Not only is the conclusion which we have stated that to which the cold rules of logic and the benign ones of natural equity lead, but it is also the conclusion to which the general principles both of the American law and the Roman law lead. It is a principle of both systems of jurisprudence, that in case of failure of descendants capable of taking, the inheritance shall go back to the kinsmen of the blood from which it came. Our statute fully recognizes this general principle, for it provides that when the inheritance comes from the paternal line, it shall go back to the kinsmen of that blood, but when the inheritance comes from the maternal line, it shall go back to the kinsmen of the mother's side. R. S. 1881, section 2471. In analogy to this general principle, it should be held that one connected by so close a relationship as that of husband should be preferred to a person who bore no relationship whatever to the ancestor. It must be presumed that the Legislature meant the statute for adoption of children to confer rights consistent with the general policy of the law, and not to produce discord by breaking the unity of the general system. To produce uniformity and harmony, it must be held, as we now hold, that the death of the adoptive child casts the inheritance which came to him through the joint adoption, back to his adoptive father, and not upon the natural mother who was an utter stranger to the person from whom the title flowed. It may be that this would require that what the adoptive child inherits from its natural kinsmen shall go back to them, but, if so, it is a good result, for this is no more than just. This was the civil law, and the principle is declared and enforced in two of the cases cited.

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The rule which we adopt does not cut off the adoptive child from inheriting from its natural relatives. It may inherit from them and from its adoptive parents. This was the rule of the civil law. Sandars' Justinian, 105. The principle is declared in *Wagner v. Varner*, *supra*, where it was said: "Because of the adoption the child acquires certain additional rights, but there is nothing in the act of adoption which in and of itself takes away other existing rights, or such as may subsequently accrue." The reason which supports this rule does not apply to the mother. She, in legal effect, severs all legal rights to the property which the child may acquire by virtue of its status to the adoptive parents, for, as to that property, she permits the correlative relation of parent and child to exist between the child and the adoptive parents. It does her no injustice to leave her with her right to such property as her child may acquire otherwise than through the adoptive parents, but it would do great injustice to permit her to secure the property acquired by her child in virtue of both its natural and adoptive rights.

If it be the law that an adoptive parent can not inherit from the child of his adoption in such a case as this, then most harsh and unjust consequences will result from the law. We suggest one instance where this would be the result: A child is adopted by a husband and wife, the wife dies the owner of \$100,000 of real estate, then the child dies, without a natural kinsmen, near or remote, and the result (if the law be that the adoptive father can not inherit) is that two-thirds of the land escheats to the State. We have put this case because it is not an improbable one, for many children who are adopted into families are waifs whose parents and kinsmen are unknown. We are not willing to declare a rule that will lead to such results.

The Supreme Court of Missouri recognize and lament the injustice of the rule which it adopts, for we find in the opinion this language: "It may seem great injustice that the property derived from one source should go in a channel never

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contemplated by the donor." In speaking of the rule of the code Napoleon and of the civil law, that the property which came to the child from its natural kinsmen shall go back to them, and that when the estate came from the adoptive parents, it should go back to these parents, the court said: "Such a provision commends itself to our sense of justice, but it is not in our statute. What changes, if any, were intended to be made in our statute of descents in connection with this law of adoption is a mere matter of conjecture, and we have no authority to depart from the rules of descent established in the general statute on that subject." We concur with that learned court in its denunciation of the rule it adopts, but we can not think that it was necessary to adopt it. We are convinced that the court, in *Barnhizer v. Ferrell*, *supra*, and in the case from which we have quoted, took entirely too narrow a survey of the question. A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look to other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. *Taylor v. Board, etc.*, 67 Ind. 383; *State, ex rel., v. Swope*, 7 Ind. 91; *Prather v. Jeffersonville, etc., R. R. Co.*, 52 Ind. 16; *Allison v. Hubbell*, 17 Ind. 559; *Aurora, etc., R. R. Co. v. City of Lawrenceburgh*, 56 Ind. 80; *Hedrick v. Kramer*, 43 Ind. 362. As it was said in *Aurora, etc., R. R. Co. v. City of Lawrenceburgh, supra*, "Construction has ever been a potent agency in harmonizing the operation of statutes, with equity and justice." Statutes are to be so construed as to make the law one uniform system, not a collection of diverse and disjointed fragments. When this principle of con-

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struction is adopted, "an enactment of to-day has the benefit of judicial renderings extending back through centuries of past litigation." Bishop Written Laws, section 242*b*. "A statute," says the author just referred to, "must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble." "The completed doctrine, resulting from a bringing together of its parts, is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting, and extending one another into one system of jurisprudence, as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms." Bishop Written Laws, sections 113*a*, 86.

Judgment affirmed.

Filed Jan. 31, 1885. Petition for a rehearing overruled Feb. 10, 1885.

No. 11,833.

THE MCCORMICK HARVESTING MACHINE COMPANY v.
GRAY.

PROMISSORY NOTES.—Consideration.—Warranty of Machine, Breach of.—Notice.—Pleading.—Counter-Claim.—In an action upon promissory notes given by the defendant in payment for a harvester and binder, he answered, setting up a warranty executed by the plaintiff's agent, whereby the machine was "warranted to be well made, of good material, and durable with care," and it was agreed that if, upon one day's trial, the machine would not work well, the purchaser should give immediate notice to the plaintiff, or its agent, and allow time to send a person to put it in order, and if it could not then be made to work well, the defendant should return it at once to the agent, and all cash and notes received in settlement would be refunded. It was alleged that the defendant, in the first harvest after he received the machine, tested it, and after vain attempts to make it run and cut, first with three horses and then with four, was compelled by its failure to work well to abandon his efforts; that its weight upon the necks of the horses was so great as to injure them; that it was defective in material and construction, and would

100	285
137	74
100	285
155	650

100	285
180	231
100	285
187	523

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not work at all; that he immediately gave notice to the plaintiff's agent, and said agent attempted to make said machine work, and failed; that defendant retained said machine at the solicitation of said agent, and on his agreement that plaintiff would so repair it by the next harvest that it would work as warranted, and, relying upon said agreement, paid one note, not in suit; that plaintiff had wholly failed and refused to repair said machine. Prayer for judgment for the amount of the note paid and for the cancellation of the notes in suit.

Held, that the answer was sufficient as a counter-claim.

Held, also, that the heavy draught and the weight upon the horses were breaches of the warranty, and the defendant was not bound to show what defect in the construction of the machine caused these results.

Held, also, that the facts, that there was an original defect in the construction of the machine, and that the plaintiff, upon notice, attempted to remedy it and failed, gave the defendant a right of action upon the warranty, notwithstanding the stipulation for notice upon one day's trial.

EVIDENCE.—*Comparison with Standards not Admitted.*—It is improper to permit a witness to base a conclusion as to the character of a machine, as to draught and manner of doing work, by comparison with other machines that the witness has seen, and which are not admitted to be true standards of excellence.

PRACTICE.—*Open and Close.*—Where, under the pleadings, the plaintiff is entitled to recover his whole demand without proof unless the defendant establishes his answer demanding affirmative relief, the latter is entitled to open and close the evidence and the argument.

SAME.—*Answers to Interrogatories.*—*Judgment Notwithstanding General Verdict.*—A judgment upon answers to interrogatories, notwithstanding the general verdict, will be rendered only when they show a fact or facts inconsistent therewith.

SAME.—*Re-Submitting Interrogatories.*—The trial court may refuse, without error, to re-submit interrogatories to the jury for additional answers, when any fuller responsive answers which they might return could not control the general verdict.

From the Pulaski Circuit Court.

N. L. Agnew, for appellant.

G. Burson and *R. L. Mattingly*, for appellee.

BLACK, C.—Action by the appellant against the appellee upon two promissory notes, executed June 30th, 1881, by the latter to the former. Answer in two paragraphs. The overruling of the plaintiff's motion to separate each of these paragraphs into two paragraphs is assigned as error; but the

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grounds of such a motion with an exception to the ruling thereon not being shown by bill of exceptions, this assignment will not be further noticed.

The plaintiff's demurrer to each paragraph of the answer, assigning want of sufficient facts, was overruled. The plaintiff replied by general denial. The cause was tried by jury, the verdict being in favor of the defendant, that he recover of the plaintiff \$100, and that the notes sued on be surrendered up and cancelled.

With their verdict the jury returned answers to interrogatories. Upon the plaintiff's motion the court caused the jury to retire again, for the purpose of answering some of these interrogatories plainly, fully and responsively. After deliberating, the jury returned and informed the court that they could make no different answers. Thereupon the plaintiff moved that the jury be required to answer said interrogatories plainly, fully and responsively. The court overruled this motion, and, over the plaintiff's objection, discharged the jury without requiring further answer to said interrogatories.

The plaintiff moved unsuccessfully for judgment upon the answers of the jury to the interrogatories, notwithstanding the general verdict, and for judgment upon the pleadings, notwithstanding the verdict. The plaintiff also moved for a new trial, and, the defendant having entered a remittitur for the sum of \$100, the court overruled the motion for a new trial, and then rendered judgment that the notes in suit be surrendered up and cancelled.

It is contended by each party that the verdict was based wholly upon the first paragraph of the answer, and the special findings of the jury seem to be capable of such a construction. We will, therefore, notice only the first paragraph.

In it the defendant admitted the execution of the notes, and alleged, in effect, that they and another note of like tenor and effect were given in payment for a McCormick harvester and twine binder; that at the time of the purchase of said machine, and of the execution of said notes, the plaintiff's

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agent executed to the defendant a warranty, partly printed and partly written, which was set out, whereby the machine ordered by the defendant was "warranted to be well made, of good material, and durable with care," and it was agreed that, "if, upon one day's trial, the machine should not work well, the purchaser shall give immediate notice to said McCormick Harvesting Machine Company, or their agent, and allow time to send a person to put it in order. If it can not then be made to work well, the purchaser shall return it at once to the agent of whom he received it, and all cash and notes received in settlement will be refunded."

It was alleged that, relying on said warranty, the defendant ordered and bought said machine and executed said notes in suit and said other note; that after receiving said machine, in the harvest of 1881, he attempted to cut his wheat and test said machine; that after vain attempts to make said machine run and cut, at first with three and then with four horses, he was compelled by its failure to work well to abandon all effort to work with it; that it was defective in material and construction, and would not work at all; that he immediately gave notice to the plaintiff's agent, named, of the failure of the machine to perform or work as represented; that said agent came and attempted to put the machine in order and to make it work, but, owing to some inherent defect in its material or construction, it would not work, and said agent was compelled to abandon all attempts to repair the machine or to put it in good working order; that four horses were insufficient to draw the machine and successfully do the work for which it was intended; that the defendant was forced to abandon all attempts to use said machine, after repeated attempts and trials made at the solicitation of the plaintiff's agent; that he could not use the machine for the reason that the weight upon the necks of the horses, when running, was so great that they were injured thereby, and that the draught of the machine was so great that four horses could not draw it without great and unusual fatigue and in-

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jury, and that to continue to use and work horses to it would have permanently injured his horses; that though three horses would be sufficient to draw and cut with ordinary harvesting machines with twine binders attached, said machine was so badly constructed that four horses could not successfully draw and cut with it; that it would not and could not be made to run and cut well; that it did not run as light as other machines made for a similar purpose, that could have been brought into the defendant's field; that it was not well made, but was unskilfully made and wholly unfit for the purpose for which the defendant purchased it, and was wholly unfit for a harvesting machine; that after said vain attempts of the plaintiff's agent to make it work as warranted, the defendant proposed and offered to said agent to return it to him for said company, but said agent requested the defendant to let it remain on his premises, and stated that he would notify the plaintiff of the failure of the machine to work, and of the defendant's offer to return it; that the matter so rested until the winter of 1882, when the plaintiff's agent came to the defendant and agreed with him that the plaintiff would rebuild said machine, put new wood-work thereto and so repair it by the next harvest that it would perform and work as warranted; that by such promises and agreement, which were relied upon by the defendant, he paid the plaintiff said other note, amounting at the time to \$125, and ordered said machine to remain on the premises; that the plaintiff had failed and refused, and still failed and refused, to rebuild said machine or to in any way remedy its defects, or to make it run and work well and repair it, or to make new wood-work for it as so promised; that said machine was and always had been useless and of no value as a harvester or for any other purpose; that the defendant was and always had been ready and willing to deliver said machine to the plaintiff, who had failed and refused to take it as agreed and understood, and had failed and refused to sur-

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render to the defendant the notes sued on and to repay the amount so paid by the defendant. Prayer for judgment for \$125, and that the notes in suit be cancelled, and for other proper relief.

This pleading seems to be sufficient as an answer of counterclaim. It showed that the machine did not fulfil the requirements of the warranty. In argument, some stress has been placed upon the fact that the pleading did not allege that upon one day's trial of the machine the defendant gave immediate notice. The machine was warranted generally to be well made, of good material, and durable with proper care. It was also stipulated that if, upon one day's trial, the machine should not work well, the purchaser should give immediate notice and allow time to send a person to put it in order, and that if it could not then be made to work well, the purchaser should return it and be entitled to repayment. It was alleged that the defendant, in the first harvest after he received the machine, tested it, and, after vain attempts to make it run and cut, first with three horses and then with four, was compelled, by its failure to work well, to abandon his efforts; that it would not work at all; and that he immediately gave notice to the agent; that the agent responded to the notice, and attempted to make the machine work well, but failed to do so, and that the machine had been retained by the defendant upon the solicitation of the agent and his promise to make it fulfil the warranty. The imperfections specially mentioned, the heavy draught and the great weight upon the horses, were breaches of the warranty, and it could not be incumbent upon the defendant to show what defect in the construction caused these results. It seems that as soon as the defendant became fully aware, by trials of the machine, that these imperfections existed, he gave the notice, and that the plaintiff accepted the notice and acted upon it. Whatever might be the effect in particular cases of the stipulation for notice upon one day's trial, the facts that there was an original defect in the con-

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struction of the machine, and that the plaintiff, upon notice thereof, attempted to remedy it, and failed to do so, gave the defendant a right of action upon the warranty.

There was no error in overruling the demurrer, or in overruling the motion for judgment upon the pleadings.

In discussing the motion for judgment in the plaintiff's favor upon the answers to interrogatories, notwithstanding the verdict for the defendant upon his counter-claim, counsel for appellant point out what they claim to be failures of the jury to find particular facts necessary to the defendant's recovery. But such silence of the special findings could not affect the general verdict. The jury answered such questions as were propounded to them. If these interrogatories and answers did not specially show all the facts necessary to support a verdict for the defendant, this could not indicate that the jury were not authorized by the evidence to find their general verdict. To support the contention of counsel concerning this motion, they should be able to point out, not the want of answers to sustain the verdict, but some one or more answers which show a fact or facts inconsistent with the general verdict. This they have not done, or attempted to do.

In the motion for a new trial, one of the causes assigned was the granting of permission to the defendant to open and close the evidence and the argument before the jury. Both paragraphs of answer sought affirmative relief, and admitted the execution of the notes in suit. The issues tried were formed by the plaintiff's denial of the answers of counter-claim. The only reason urged why the plaintiff should have been permitted to open and close is that the notes in suit provided for the payment of attorney's fees. But they each provided for the payment of ten per cent. attorney's fee. No evidence was necessary to determine the amount of the attorney's fee, which would be a mere matter of calculation. Under the pleadings, the plaintiff was entitled to recover its whole demand without any proof, unless the defendant, by his evidence,

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established his counter-claim. The defendant, therefore, was entitled to open and close. See *Reynolds v. Baldwin*, 93 Ind. 57, and cases there cited.

James McMurray, a witness testifying for the defendant, after giving evidence of his having seen the machine in question at work, and of his having some knowledge of machines and some experience in running them, was asked by the defendant: "From your knowledge of harvesting machines, and from your acquaintance with defendant's machine, and in comparison with other machines, how did this machine work in the harvest of 1881, as to draught and manner of doing work?" Over the plaintiff's objection, the witness answered: "It certainly ran harder than other machines that I had seen run, that year; the manner of doing the work when it did work, was very well; the other part it was not working."

The plaintiff moved to strike out this question and answer, and the motion was overruled. Here, we think, was error. It was improper to permit the witness to base a conclusion concerning the machine in question upon particular facts which were not before the jury, and could not properly be brought before them. A comparison, in the mind of the witness, of the machine in question with the other machines that the witness had seen, could not aid the triors in arriving at a definite and correct estimate of the defendant's machine. The impracticability of proving the character of a machine by comparison with standards not admitted to be true standards of excellence must be apparent. 1 Greenl. Ev., section 52; *Bauer v. City of Indianapolis*, 99 Ind. 56.

The interrogatories to which the plaintiff desired the jury to make additional answers were such that any fuller answers which would have been responsive could not have controlled and overridden the general verdict. *Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143.

Without expressing any opinion as to the sufficiency of the evidence, we think the judgment should be reversed for the error indicated.

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PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed at the appellee's costs, and the cause is remanded for a new trial.

Filed Feb. 12, 1885.

No. 11,742.

THE ATLAS ENGINE WORKS v. RANDALL.

MASTER AND SERVANT.—*Inexperienced Servant.—Dangerous Employment.—*

Caution.—It is the duty of a master not to expose an inexperienced servant to a dangerous service without giving him warning, or such instruction as will enable him to avoid injury, unless both the danger and the means of avoiding it are apparent.

SAME.—*Alter Ego. — Fellow Servants.*—If the master subjects the servant to the command of another, without information or caution with respect to such obligations as the master owes, the other stands in the master's place, notwithstanding the two servants are, as regards the common employment, fellow servants. *Aliter*, if he defines the duty and authority of each with respect to the other, or gives instructions covering the subject of their employment, so as to give no authority to the one over the other, or so as to point out the danger of the service and the means of avoiding it.

SAME.—*Equal Knowledge of Danger.—Negligence.*—Where both the master and the servant have equal knowledge of the danger of the service required and of the means of avoiding it, and the servant, while engaged in the performance of the work he is set to do, is injured by reason of his own inattention and negligence, the master is not liable.

CONTRIBUTORY NEGLIGENCE.—*Minor.*—Contributory negligence on the part of a minor will defeat his right to recover for an injury, as in the case of an adult.

From the Marion Superior Court.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellant.

H. N. Spaan, for appellee.

MITCHELL, J.—This action was brought by Louis E. Randall to recover damages for an injury sustained by him while in the service of the Atlas Engine Works.

The evidence tended to show that the appellee was within a few days of nineteen years old at the time he engaged in the ap-

100	908
194	337
194	380
100	908
129	264
129	331
100	908
130	183
100	908
134	581
134	630
100	908
161	402

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pellant's service; that he was an intelligent, active young man, having the ordinary experience and development of persons of that age; that he had worked some about a blacksmith shop, at farming and bridge building, but had no particular experience with machinery such as that used in the appellant's shops.

He was employed by the superintendent of the appellant's boiler department as a helper to one Smith Walker, whose business was to attend to the operation of a certain machine called a "flange punch," which was a machine used for drilling or punching holes in boiler iron. The evidence tended to show that he was subject to the direction of Walker, so far as receiving from him instructions as to his duties in connection with the operations of this machine. This machine consisted of a heavy iron frame four or five feet in length, and about twelve or fourteen inches wide, and of suitable height, and had, as part of its gearing, to give motion to the punch which was adjusted to it, two cog-wheels indenting into each other, the larger of which was forty-two inches in diameter and the smaller seven inches. These were operated by a belt passing over a pulley connected with the machine, thence passing over a pulley on a line-shaft attached to the building. When in motion, the evidence tended to show that the larger cog-wheel made from forty to fifty revolutions per minute, and the smaller one about two hundred, and that the point of indentation of the two wheels was about nine inches from the top of the frame, and from three to five inches out from the side of the body or frame.

The plaintiff testified that on the fifth day after he entered the defendant's service, he was directed by Walker to procure some "waste" from the tool-room, and, during the temporary absence of Walker from the machine, wipe off the top of the frame, while the wheels were in motion. He also testified that he was not cautioned by Walker, or any one else, concerning the danger of getting his hands or person into the cog-wheels, and that he had no directions how to pre-

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vent his hands from becoming involved in these wheels while wiping off the top of the frame. On the other hand, Walker testified that he was temporarily called away from his post by the superintendent; that he gave the appellee no directions to wipe off the machine at all; that there was no particular necessity for wiping it off at that time; and that he had on several occasions before that cautioned him not to get his "hands in the cog-wheels," and not to go too close to the wheels.

While engaged in wiping off the top of the frame of this machine, the appellee's hand was caught between the cog-wheels, and was so crushed and lacerated that the loss of all, save the thumb and one finger, resulted.

It was shown that after the injury the cog-wheels were covered, or "boxed," as it is termed, and that the danger in leaving the wheels exposed was not so much to persons at work with or about the machine, as to persons passing by it.

The injury appears to have occurred in this way: While the appellee was wiping off the top of the machine, instead of holding the "waste" compactly in his hand, he allowed shreds or ends of it to dangle below his hand, and the ends so hanging down becoming involved in the cog-wheels, his hand was drawn into the wheels and injured as described.

There was a general verdict for the plaintiff below, and with the general verdict the jury returned answers to special interrogatories.

By these answers the jury returned that the plaintiff and Smith Walker were co-employees, and that he was a young man about nineteen years old at the time of the injury, of average intelligence and capacity, and that the danger from the cog-wheels was apparent to any person of ordinary intelligence and capacity.

Over motions for a new trial, and for judgment on the special findings of the jury, the plaintiff had judgment.

Counsel for appellant contend that there is a fatal variance in the proof as to some of the essential averments in the complaint.

It is averred in the complaint that the machine at which the plaintiff was injured was defective in construction, in that it required frequent cleaning, and could not be stopped for that purpose, but had to be cleaned while in motion; that the cog-wheels, being exposed and without covering, were a source of constant danger to those operating the machine, and that the defendant, with full knowledge of the plaintiff's youth and inexperience, "directed, ordered and compelled" him to clean it while in motion.

It is insisted that there was no evidence whatever showing that the defendant ordered, directed or compelled the plaintiff to clean the machine while it was in motion. From the evidence given, the jury may have found that Randall was employed by the superintendent of the boiler department, and that he was subject to Walker's orders. There is also evidence from which it may have been found that Walker directed him to wipe off the top of the machine while it was in motion, without giving him any caution with respect to the danger of so doing.

The argument of counsel is that Walker and Randall were fellow servants engaged in the same general employment, and conceding that Walker did order or direct him as claimed, without giving him notice or proper caution, yet, as this was but the negligence or fault of a fellow servant, it is said this can not be imputed to the master. So far as the service in which they were engaged pertained to their common employment, in operating the machine, they were beyond doubt fellow servants. If either sustained an injury from the negligence of the other, while so engaged, the master is not liable. It is claimed, however, that the appellee was put under subjection to Walker, and that he was directed to obey his orders, and that he was not cautioned of the danger of the particular service required of him when he received the injury.

One of the well recognized duties of a master is not to expose an inexperienced servant, at whose hands he requires a dangerous service, to such danger without giving him warn-

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ing. He must also give him such instruction as will enable him to avoid injury, unless both the danger and the means of avoiding it while he is performing the service required are apparent. These are obligations of the master, and he can not exempt himself from liability by delegating his power to command the servant to another upon whom the obligation to instruct and caution is also imposed.

If the agent or servant upon whom the power to command is given exercises the power, and fails to discharge the obligation, to the hurt of the servant who is without fault, the failure is that of the master, and he must respond.

The master having subjected the servant to the command of another without information or caution with respect to all such obligations as the master owes, the other stands in the master's place, and this is so notwithstanding the two servants are, as regards the common employment, fellow servants.

If the master has by general or special instructions defined the duty and authority of each with respect to the other, or given instructions covering the subject of their employment, so as to give no authority to the one over the other, or so as to point out the danger of the service and the means of avoiding such danger, the rule can have no application. *Mitchell v. Robinson*, 80 Ind. 281 (41 Am. R. 812); *Indiana Car Co. v. Parker*, ante, p. 181; *Railroad Co. v. Fort*, 17 Wall. 553; *Lalor v. Chicago, etc., R. R. Co.*, 52 Ill. 401 (4 Am. R. 616); *Brabbitts v. Chicago, etc., R. W. Co.*, 38 Wis. 289; *King v. Ohio, etc., R. R. Co.*, 8 Am. & Eng. R. R. Cases, 119; *Shanny v. Androscoggin Mills*, 66 Maine, 420; *Baxter v. Roberts*, 44 Cal. 187 (13 Am. R. 160); *Atchison, etc., R. R. Co. v. Holt*, 29 Kan. 149; *Cooley Torts*, 553 to 563, and notes; 2 Thompson Neg. 976, 978, 979, 1028 to 1033.

As applicable to the facts and circumstances developed in this case, two things were material to be proved in order to fix the liability of the appellant: 1. That the danger to which the appellee was exposed, and which was the proximate cause of the injury, was one which was known, or might reasonably

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have been apprehended, by the appellant. 2. That such danger was one which, by the exercise of the faculties of the appellee, when directed to the thing he was commanded to do, was not open to his observation and apprehension, assuming that he was giving care and attention to the work required of him. Upon both of these propositions we think the proof falls short of making out the case.

The proximate cause of the injury grew out of the fact that the appellee, in wiping off the top of the machine, needlessly held the waste in his hand in such manner as to permit the ends or parts of it to hang down about nine inches below, and from three to five inches out from the top line of the frame, and by that means to become involved in the revolving cog-wheels. Conceding that Walker directed him to wipe off the machine with waste, and that he gave him no caution, about which there is serious dispute, yet he could not know or reasonably apprehend that he would do it in the manner described. The act of the appellee in permitting the substance employed in wiping the machine to hang down in the manner stated, presumably under his immediate observation, was a thing, under the circumstances, so highly improper and unnecessary in any possible contingency, that the foreman could not reasonably have anticipated that it might occur. A reasonably prudent and cautious foreman might well believe that the work could be safely done, if done in a manner which the appearances and exigencies of the situation itself would suggest to a person nineteen years old, and he had a right to rely upon the fact that what he directed to be done would be done with due regard to all the hazards which were open to the perception, and which must lie immediately under the eyesight of the appellee, if he was giving attention to the very thing which he was directed to do. Ordinary, usual or probable consequences resulting from attentive application to the service demanded, the foreman was bound to anticipate and caution against, but he was not bound to anticipate extraordinary, unusual and improbable occurrences which involved inattention

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on the part of the appellee. And so as to the other requisite to the appellant's liability, it seems clear to us, upon the appellee's own statement, that if he had been giving attention to what he was doing, the injury would not have occurred.

Every hypothesis upon which the facts can be considered fails to account for the accident and resulting injury, except that which assumes that the appellee was not giving attention to his hands and the manner in which the waste was held.

As was said by COOLEY, J., in the case of *McGinnis v. Canada Southern Bridge Co.*, 8 Am. & Eng. R. R. Cases, 135: "It was thus made to appear by his own examination that he was not sent into unknown dangers, and that he was not exposed to risks which he, through immaturity or for any other reason, failed to comprehend."

Contributory negligence on the part of a minor, when it is established, will defeat his right to recover for an injury, precisely as in the case of an adult. *Chicago, etc., R. W. Co. v. Harney*, 28 Ind. 28; *Umbach v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Brazil, etc., Co. v. Cain*, 98 Ind. 282. The case is plainly distinguishable from *Hill v. Gust*, 55 Ind. 45, and the case of *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572 (3 Am. R. 506), cited therein.

In the first case, a boy was compelled to drive and manage a wild, fractious horse, on a high embankment between two trains of steam cars, and while in that situation he was injured by the horse getting beyond his control, and it was held in that as in the case cited and relied on, that the mere fact that he could have seen that such place was dangerous, by exercising his faculty of sight, was not sufficient to defeat his right to recover. In that case, the minor was compelled to go into a situation, highly dangerous, charged with the management of a horse whose control was beyond his strength. No degree of attention or strength at his command was of any avail. The parallel between that case and this is lost as soon as the two are stated. And so in the Massachusetts case, in which a boy, fourteen years old, was injured by com-

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ing in contact with one machine which was left unguarded, and in such close proximity to another at which he was employed, that in doing his work in the manner in which he was instructed to do it, his hand was brought in contact with the unguarded machine and injured. In that case the attention of the boy was necessarily directed to the machine at which he was engaged, and not to the unguarded machine which inflicted the injury. While here the very duty which the appellee was required to perform was such that every moment his attention was given to it the danger of the situation was apparent, and the means of evading it simply his own volition. If the attention of the appellee had been, as in the Massachusetts case, withdrawn from the source of danger by the requirements of his employment, the case would involve considerations which are conspicuously absent. For a case in all respects parallel, see *Shanny v. Androscoggin Mills*, 66 Maine, 420.

Where an inexperienced servant is required to perform a hazardous service, in the performance of which extraordinary caution or peculiar skill is required, in order to enable him to avoid dangers which may be apparent, it may be a question for a jury to determine whether, under all the circumstances, the master gave sufficient caution of the danger or adequate information of the means necessary to avoid it, or whether the servant was guilty of contributory negligence in not avoiding it. But the evidence in this record fails to make a case of that character. So far as appears from the evidence in this case, no extraordinary caution or peculiar skill was necessary to avoid the injury sustained. Nothing was necessary except that the appellee should give attention to his hands, over which he had complete control.

The conclusion at which we have arrived is, that upon the facts as presented by the evidence in the record, this must be held to be a case in which both parties had equal knowledge of the danger of the service required, and of the means of avoiding it. Both had equal knowledge of the consequences

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which would result if the appellee allowed his hands to become involved in the cog-wheels, and both knew that the only means necessary to avoid that result were nothing more than that the appellee should give attention to the work which he was set to do. The appellant had a right to expect such attention.

It is suggested that upon the special findings of the jury judgment should have been rendered for the appellant notwithstanding the general verdict. This view does not seem to be seriously pressed, and while there might be some difficulty in sustaining the general verdict as against the special findings, yet we think if it could be said that it was in all other respects sustained by the evidence, there may be some theory upon which it might stand notwithstanding the special findings.

Some instructions were asked and refused, and some given by the court, upon which error is predicated, but it is believed no useful purpose can be subserved by prolonging this opinion with a particular examination of the instructions given or refused.

Judgment reversed, with costs.

Filed March 11, 1885.

No. 11,770.

**BOND v. EVANSVILLE AND TERRE HAUTE RAILROAD
COMPANY.**

RAILROAD.—Fences.—If proper fences are built and maintained, it will make no difference, in an action by an adjoining land-owner for stock killed, whether such fences are built and maintained by the railroad company or such adjoining land-owner, or whether they are upon the right of way, or upon the lands of such owner, with his consent.

SAME.—Agreement by Land-Owner to Fence.—Animals.—Where an adjoining land-owner expressly or impliedly agrees to build and maintain fences between his lands and the railroad, as to him the track will be regarded as fenced, and he can not recover from the company for the loss of animals which, for the want of such fence, pass to the track and are injured or killed.

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SAME.—Farm Crossings.—Gates.—Negligence.—Where gates are allowed at farm crossings for the convenience of an adjoining land-owner, he is bound to keep them closed, and if he fails to do so, and his animals pass through them to the railroad and are injured or killed, he can not recover from the company on the ground that it has neglected to fence its track as required by the statute.

SAME.—Cattle-Pits.—In such case, and as to such land-owner, the company is not bound to maintain cattle-pits at such crossing.

From the Knox Circuit Court.

G. G. Reily and *W. C. Niblack*, for appellant.

F. W. Viehe and *M. J. Niblack*, for appellee.

ZOLLARS, C. J.—Upon each side of, and upon the line of its right of way, which extends north and south through appellant's farm, the appellee has maintained fences, except a space in front of appellant's house on the east side of the track. In front of the house is a piece of ground seventy-five feet square, outside of the right of way proper, on all sides of which, except that on the line of appellee's right of way, there are and have been secure fences. Appellant has owned the farm for seventeen years. He built and has maintained the fences around the above named piece of ground since he has owned the farm. He got the farm from his father. Whether or not this piece of ground was fenced in the manner it now is while the father owned the farm, is not certain from the evidence. In the fence on the west side of the track, and in the fence surrounding the above named piece of ground, appellant has maintained gates. Through these gates, and over a crossing, prepared by appellee, he passes, and has passed from one side of his farm to the other, and in reaching a highway leading to Vincennes and other places. These, or similar gates, and the crossing, were used by the father. In short, that crossing has been there since the railroad was constructed many years ago. Whether the father had contracted with the company to maintain the fence around the square piece of ground, is not shown. Appellant has maintained those fences and the gates, as he states, without any express

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contract with the company. It seems that appellant has allowed some of his neighbors to use these gates and the crossing, in reaching the highway, and in going to Vincennes and other places. Whether or not the company knew of such use by the neighbors, is not shown by the evidence. There are neither cattle-pits at, nor wing fences from, the crossing at the track. Appellant's mule colt and hogs, for the loss of which this action is prosecuted, were killed south of this crossing by one of appellee's trains. No question is made as to the sufficiency of the fences proper.

It is not shown how the hogs got upon the right of way, neither is there anything but conjecture as to how the colt got upon the right of way, as there is no evidence that the gates were left open by any one at or near the time of the killing. The case, however, is submitted upon the theory that some one left the gate open, which is in the fence around the square piece of ground, and that the colt passed through it, and thence to the railroad. The contention of appellant is that the square piece of ground was not fenced by the company, and that it did not maintain cattle-pits at the crossing, and hence is liable for the value of the animals killed, under the statute which requires railroad companies to fence their tracks. The court below held against him. He has appealed, and asks a reversal of the judgment upon the evidence. The question is, Was the railroad so securely fenced by the railroad company as to defeat appellant's action? It makes no difference whether the fences are built upon the company's own ground, or over upon the land of an adjoining proprietor; if there by his consent, the road would still be fenced. If, then, by the consent of appellant, the company had built fences around the square piece of ground in front of his house, as they were built by him, the railroad would have been fenced just as effectually as if built upon the line dividing appellant's land and the right of way. The fact that the fences were thus built, with the other circumstances, shows that this

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piece of ground was, for the time being, abandoned as farming land, and thrown into the right of way. Nor can it be said that the railroad was not fenced at this point because the fences were built around the square piece of land by appellant, and not by the company. It is not material who builds and maintains the fences, so they are built and maintained. *New Albany, etc., R. R. Co. v. Pace*, 13 Ind. 411. It has long been held by this court that where a person through whose land a railroad is constructed agrees to build and maintain fences along the right of way, the road will be regarded as fenced as to him, and that if he fails to build and maintain such fences, and his animals pass to the track and are killed, he can not recover from the company on the ground that it has not fenced its track as required by the statute. *Terre Haute, etc., R. R. Co. v. Smith*, 16 Ind. 102.

This exoneration from liability under such circumstances was at one time extended to all persons. It has, in later cases, been confined to the parties agreeing to keep up the fences. As to them it has never been questioned, but many times approved and reaffirmed. *Bellefontaine R. W. Co. v. Suman*, 29 Ind. 40; *Indianapolis, etc., R. R. Co. v. Petty*, 25 Ind. 413; *Fort Wayne, etc., R. R. Co. v. Mussetter*, 48 Ind. 286; *Cincinnati, etc., R. R. Co. v. Ridge*, 54 Ind. 39; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; *Louisville, etc., R. W. Co. v. Skelton*, 94 Ind. 222.

There is no good reason why this agreement to keep up fences may not be an implied agreement, so as to defeat an action against the company under the statute in relation to fencing. It was held in the case of *The Indianapolis, etc., R. R. Co. v. Shimer*, 17 Ind. 295, as stated in the syllabus, that "Where a railroad company has securely fenced its road, except at certain places where the owner of the land is permitted to erect draw-bars or gates for his own convenience in crossing said road, and by reason of the neglect of such land-owner to maintain such bars or gates, his stock

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passes upon the railroad track and is killed, the company is not liable for the damages sustained." This case, like the others above cited, does not extend the rule beyond the immediate party for whose benefit the privilege of gates, etc., is granted. It does not apply to third parties, and, like the other cases, this has been many times cited with approval in subsequent cases. The doctrine of this case, we think, is a reasonable one, and should be applied in the case before us. As we have said, there is no controversy about the sufficiency of the fences around the square piece of land. It is not necessary, therefore, for us to decide or indicate anything as to what might be the rule, and the liability of appellee, should that fence be allowed to become insecure, and by reason thereof animals should escape and be injured or killed. For aught that appears here, the railroad company might have forbidden the gates maintained and used by appellant. They have been allowed for his accommodation. He has erected and maintained them for his own accommodation. The privilege is doubtless a valuable one to him. If he has so used them, or allowed them to be so used, that they have been left open, so that his animals have escaped through them, it has been his own fault, for which he should not hold the railroad company liable. When these gates are shut, the railroad is securely fenced. An adjoining land-owner can not tear down fences built by the company, nor leave gates open which he has been allowed to maintain for his own convenience, and then hold the company liable for not having erected fences and cattle-pits at the crossing to protect him against his own wrong or negligence. If he commits the wrong or abuses the privilege, he must take the risk and consequences. And besides, the most that could be accomplished by using fences and cattle-pits would be to confine the crossing to a narrower space, because cattle-pits could not be erected to keep animals from the track without destroying the crossing; and besides, further,

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if a crossing of any kind is provided, animals might as readily be injured upon it as elsewhere.

We think that the judgment of the court below is right upon the evidence, and it is therefore affirmed with costs.

Filed Feb. 10, 1885.

No. 10,774.

WOOLSON, ASSIGNEE, v. PIPHER ET AL.

VOLUNTARY ASSIGNMENT.—*Possession of Goods.—Intervening Liens.*—The voluntary assignment of his goods by a failing debtor, for the benefit of his creditors, where the possession of the goods is not delivered to nor taken by the assignee, will not defeat the intervening liens of attaching creditors before the consummation of such assignment by the delivery of possession of the goods to the assignee.

From the Martin Circuit Court.

T. M. Clarke, for appellant.

Howk, J.—The appellant, Woolson, as assignee in the voluntary assignment of F. W. Tipton & Co., commenced this action in the court below against the appellee Pipher, as the sheriff of Martin county, and a large number of other persons, attaching creditors of the firm of F. W. Tipton & Co. The object of the action was to recover the possession of a stock of merchandise, lately before the property of F. W. Tipton & Co., which had been seized by and was in the possession of appellee Pipher, as such sheriff, at the suit of his co-appellees, attaching creditors of F. W. Tipton & Co. The cause was put at issue and tried by the court, and a finding was made for the appellees, the defendants below, and, over appellant's motion for a new trial, the court adjudged that he take nothing by his suit, and that the appellees recover of him their costs.

Error is assigned here by the appellant which calls in question the decision of the circuit court in overruling his motion for a new trial. He has also assigned as error the overruling

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of his motion in arrest of judgment. But his motion in arrest only questioned the sufficiency of his own complaint, and, as the insufficiency of his complaint would afford him no ground for the reversal of the judgment, we need not consider this supposed error. *Hansher v. Hanshew*, 94 Ind. 208.

In appellant's motion for a new trial the only causes assigned therefor were, (1) that the finding of the court was not sustained by sufficient evidence, and (2) that such finding was contrary to law. The case is presented here, therefore, wholly upon the evidence. Did the appellant, the plaintiff below, show by sufficient evidence that he was entitled, as against the appellees, at the time he commenced this suit, to the possession of the goods and chattels described in his complaint? This is the question we are required to consider and decide in this court. The appellees' counsel have not favored us with any brief or argument in support of the decision and judgment of the trial court. Appellant's counsel, in his brief of this cause, says: "Our court decided that to render an assignment effective to pass property in this State, whether executed in this State or not, the provisions of section 2663, R. S. 1881, must in all things be complied with, and especially the provision that the indenture shall, within ten days after the execution thereof, be filed with the recorder of the county, '*where the goods are situated.*' In this we think the court erred; section 2663 requires nothing of the kind. It does require that the indenture shall be filed with the recorder of the county '*in which the assignor resides.*'"

It may possibly be that the trial court made the decision imputed to it by appellant's counsel; but the record of this cause, by which alone this appeal must be determined, does not disclose any such decision. It is shown by the record that the trial court admitted all the evidence offered by either the appellant or the appellees; that upon the evidence the court found for the appellees, and that the court overruled the appellant's motion for a new trial, and rendered judgment upon

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its finding. The court's reasons for making these decisions are not stated in the record.

Over the appellees' objections, the appellant first gave in evidence a certified copy of an indenture of assignment, purporting to have been executed to him on the 11th day of September, 1882, in the county of Licking and State of Ohio, by F. W. and J. C. Tipton, partners in trade under the firm name of F. W. Tipton & Co., by which indenture the said firm sold, assigned and transferred to the appellant "all and singular the goods, chattels, choses in action, evidences of debt, claims, demands, property and effects, of every description, belonging to them, wherever the same might be situated," in trust for the benefit of each and all of their creditors. The indenture purported to have been acknowledged, on the day of its date, before a notary public of Jefferson county, Ohio, and, on September 13th, 1882, appellant's acceptance in writing of the trust appeared to have been endorsed on the indenture. The copy of the indenture appeared to have been certified by the judge and *ex officio* clerk of the probate court of Licking county, under his hand and the seal of the court. Appellant then gave in evidence a certified copy of his bond as assignee, filed in the probate court of Licking county, and a certified copy of his letters of authority, as assignee, issued by such probate court. Appellant then offered to prove, and the appellees admitted, that he, as such assignee, was in Shoals, in Martin county, and was in actual personal possession of the goods described in the complaint, under the aforesaid assignment, on the 17th day of September, 1882, when possession thereof was taken from him by appellee Pipher, as sheriff, under writs of attachment in favor of his co-appellees, and, further, that the goods so described were the identical goods assigned to appellant by F. W. and J. C. Tipton.

Appellees then offered to prove, and the appellant admitted, that the writs of attachment, issued to appellee Pipher as sheriff, and upon which he had taken and then held possession of the goods in controversy, were delivered to appellee Pipher as

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sheriff of Martin county, on the 16th day of September, 1882, and prior to the time the appellant was put in actual possession of such goods. This was all the evidence given in the cause.

We are of opinion that upon this evidence the appellant was not entitled to recover the possession of the goods in controversy. The several writs of attachment in the hands of the appellee Pipher, as sheriff, were valid and subsisting liens upon the assignor's goods, in Martin county, at and before the consummation of their voluntary assignment thereof by delivery to the appellant. Section 922, R. S. 1881. The cause was tried and determined below about two months after the seizure of the goods by the sheriff, and yet the appellant did not prove, nor offer to prove, that he had ever complied with any of the provisions of the statute of this State in relation to voluntary assignments. It is certain, we think, that the mere written assignment of the goods, executed as it was in another State, did not give the appellant any such title to the property as would defeat the liens of the attaching creditors of the assignors. Possession of the goods was indispensable to the perfection of appellant's title, and, before the delivery of possession to him, the liens of the attaching creditors on the goods intervened.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed Feb. 21, 1885.

No. 11,871.

THAMES LOAN AND TRUST COMPANY v. BEVILLE ET AL.

PLEADING.—*Demurrer*.—A demurrer can be sustained only for defects apparent on the face of the pleading to which it is filed.

VERDICT.—*Uncertainty*.—*Venire de Novo*.—A verdict which reads, "We, the jury, find for the plaintiff and assess her damages at \$175, with six per cent. interest," is not so uncertain or defective as to authorize a *venire de novo*.

100	309
128	476
100	309
130	392
100	309
139	191
100	309
142	441
100	309
150	104

Thames Loan and Trust Company v. Beville *et al.*

PRACTICE.—*Supreme Court.—Judgment.*—The correctness of a judgment can not be questioned for the first time in the Supreme Court.

SAME.—*Bill of Exceptions.—Omission of Evidence.*—Where it appears by the bill of exceptions that it does not contain all of the evidence rendered at the trial, that which is in the record can not be examined to determine its sufficiency to sustain the verdict.

SAME.—*Affidavits as to Cause of Omission.*—The failure to include all the evidence in the bill of exceptions can not be remedied by filing affidavits in the Supreme Court asserting that the absent evidence was omitted by agreement of the parties to the action.

CONTRACT.—*Correspondence.—Evidence.*—A contract need not be embraced in a single writing, but may be contained in letters constituting a correspondence between the parties, and such letters are admissible for the purpose of proving the contract and its terms and conditions.

From the Marion Superior Court.

D. M. Bradbury, for appellant.

J. L. McMaster and *A. Boice*, for appellees.

COLERICK, C.—The appellees sued the appellant to recover damages for the breach of a contract. The complaint was in three paragraphs. The first and second were withdrawn before the issues in the case were formed, and an answer to the third paragraph, in two paragraphs, was filed, the first being a general denial. A reply in denial was filed to the second paragraph of the answer. The issues were tried by a jury, who returned a verdict in favor of the appellee Nancy P. Beville for \$175, upon which, over motions for a *venire de novo*, new trial, and in arrest of judgment, a judgment was rendered in her favor against the appellant, from which it has appealed to this court. The errors assigned are the rulings of the court upon the motions above mentioned. The motion in arrest of judgment assailed the sufficiency of the third paragraph of the complaint, which, in substance, averred that the appellant entered into an agreement, in writing, with the appellees to sell and assign to the appellee Nancy a certificate of sale executed to the appellant by the sheriff of Marion county, Indiana, for the real estate therein described, and for which certificate the appellees were to pay to the ap-

pellant upon the assignment of the certificate to Nancy the sum of \$750; that the appellant, pursuant to said agreement, caused an assignment of the certificate to be properly endorsed thereon and forwarded the same to its agent at Indianapolis, Indiana, with instructions to deliver it to Nancy on the payment by her of the purchase-money therefor, a copy of which certificate and assignment were filed with and made parts of the complaint; that upon its receipt by the agent the appellees tendered to him, as such agent for the appellant, said sum of \$750 in gold coin, and demanded from him the delivery to Nancy of the certificate and assignment, which he refused to deliver; that the appellant would not perform its contract; that the certificate at the time the tender was made and delivery refused was worth \$2,500, and that by reason of the facts above recited the appellees had been damaged in the sum of \$2,000, for which they demanded judgment. It was also averred that the appellees were unable to file with their complaint a copy of the agreement sued upon, because it was in the possession of the appellant.

The sole objection urged in this court to the complaint, by the appellant, is, that it appeared by the evidence adduced at the trial that the agreement of the appellant to assign the certificate to Nancy was conditional, and as it was not alleged in the complaint that the conditions upon which the assignment was to be made, as shown by the evidence, had been performed or waived, that the complaint, for that reason, was insufficient. The evidence can not be examined for the purpose of determining the sufficiency of the complaint. It is settled by the decisions of this court that a demurrer can be sustained only for defects apparent on the face of the pleading to which it is filed. *Douglass v. Blankenship*, 50 Ind. 160; *Hust v. Conn*, 12 Ind. 257.

If the complaint on its face had shown that the performance by the appellant of the agreement therein mentioned, and upon which the action was founded, was conditional, it

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would have been essential to the sufficiency of the complaint to have alleged therein either the performance of the conditions or a waiver by the party in whose favor they existed of their performance. See *Newman v. Perrill*, 73 Ind. 153. But as it did not so appear, no such averment was necessary.

The appellant, in support of its motion for a *venire de novo*, insists that the verdict was so uncertain and defective in form that no judgment for a sum certain could be rendered thereon. It was as follows:

"We, the jury, find for the plaintiff and assess her damages at one hundred and seventy-five dollars, with six per cent. interest.
MONROE BLACK, Foreman."

To authorize a *venire de novo*, the verdict must be so uncertain, ambiguous or defective that no judgment can be rendered thereon. See 1 Works Pr., section 970, and the decisions of this court there cited.

A verdict will not be rejected on account of mere informalities or technical defects, if it can be understood by the court. *Daniels v. McGinnis*, 97 Ind. 549; *Thayer v. Burger*, ante, p. 262. The court in this case correctly understood by the verdict that the sum assessed by the jury as damages was to draw six per cent. interest from the time of the rendition of the verdict, and rendered judgment thereon accordingly. The correctness of the judgment so rendered was not questioned by the appellant. No objection was made or exception reserved to its rendition, nor was any motion made to modify or vacate the same, or any part thereof. Its provision as to interest can not be assailed for the first time in this court. See *Train v. Gridley*, 36 Ind. 241.

Many reasons were assigned in support of the motion for a new trial, but the only ones discussed by the appellant in its brief question the sufficiency of the evidence to sustain the verdict, the correctness of an instruction given by the court to the jury, and rulings of the court below in the admission of certain evidence specified in the motion.

It clearly appears by the bill of exceptions that it does not

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contain all the evidence rendered on the trial of the action, although it purports to do so. In the absence of the omitted evidence, we can not examine that which is in the record to determine its sufficiency to sustain the verdict. See *Ward v. Bateman*, 34 Ind. 110; *Morrow v. State*, 48 Ind. 432; *Hinkle v. Margerum*, 50 Ind. 240; *Hammon v. Sexton*, 69 Ind. 37; *Hendrix v. Rieman*, 90 Ind. 119; *Louisville, etc., R. W. Co. v. Porter*, 97 Ind. 267.

The appellant seeks to avoid the result that flows from its omission to embrace in the bill of exceptions all the evidence rendered on the trial, by filing in this court an affidavit in which it is asserted that the absent evidence was omitted therefrom by agreement of the parties to the action, which assertion is denied by the appellees in counter-affidavits filed by them. We can not consider or determine the controversy between the parties as to the cause of the omission to embrace in the bill of exceptions the absent evidence. We can look alone to the bill of exceptions to ascertain the facts in the case as developed by the evidence. See *Bartel v. Tieman*, 55 Ind. 438. And if it is, in that respect, deficient or imperfect, as in this case, its deficiencies or imperfections can not be supplied or remedied in the manner resorted to and adopted by the appellant. See *Blizzard v. Blizzard*, 48 Ind. 540.

The only instruction given by the court, of which the appellant complains, was as follows: "The plaintiffs must prove that there was such a contract as that set up in the third paragraph of their complaint, and that it was in writing; proof of a verbal contract will not suffice. Plaintiffs must also prove that it was signed by the defendant, or by some officer authorized to sign for the defendant. It is not necessary, however, that it should have been signed by the plaintiffs, or either of them. Neither is it necessary that such contract should have been all contained in a single writing, but it may be contained in letters constituting a correspondence between the plaintiffs and the defendant. If contained in letters, it is

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not necessary that any of them should have been written by the plaintiffs personally, but it will be sufficient if the letter or letters containing the plaintiffs' proposition were written at their request, or in their behalf, or with their assent, and that the contents of the letter or letters containing the answer to such proposition were communicated to the plaintiffs and assented to by them." The sole objection presented by the appellant to this instruction is, that it permitted the jury to determine whether or not the letters referred to constituted a contract between the parties. The instruction is not justly subject to any such criticism. It merely informed the jury, as a legal proposition, that a contract need not be embraced in a single writing, but may be contained in letters constituting a correspondence between the parties, which was a correct statement of the law. See *Wills v. Ross*, 77 Ind. 1 (40 Am. R. 279).

The court, over the objection and exception of the appellant, admitted in evidence certain letters written by D. M. Bradbury for the appellees to the appellant, in which an offer by them for the purchase of the certificate in dispute was submitted to the appellant for its acceptance, and letters written by an authorized officer of the appellant in response thereto accepting the offer so made. These letters, which created and constituted the contract sued upon, were admissible for the purpose of proving the contract, as well as its terms and conditions. See *Wills v. Ross*, *supra*. They sufficiently identified the property which was the subject-matter of the contract.

This disposes of all the questions submitted for our consideration, and as there is no error in the record the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellants.

Filed Feb. 12, 1885.

Hines et al. v. Driver.

No. 10,644.

HINES ET AL. v. DRIVER.

NEW TRIAL.—Practice.—Complaint.—Demurrer.—An application for a new trial made after the close of the term is an independent proceeding, and must be by complaint, and the sufficiency of the complaint may be tested by demurrer.

SAME.—Exhibits.—Newly Discovered Evidence.—In a complaint for a new trial it is proper to set out the evidence given on the former trial, and the affidavits containing the newly discovered evidence in exhibits filed with the complaint, and such exhibits will be considered part of the complaint for that purpose, but not for the purpose of supplying averments that should be made in the body of the pleading.

SAME.—Second New Trial.—A party can obtain a second new trial upon the ground of newly discovered evidence only in very rare cases and by making an unusually strong and satisfactory case.

SAME.—Complaint Must Show that Evidence was not Discovered during Term.—It must be shown in a complaint for a new trial upon the ground of newly discovered evidence, that it was not discovered during the term.

SAME.—Diligence.—Facts Must be Pleaded.—The facts constituting the diligence alleged to have been used to obtain evidence must be pleaded, and it is not sufficient to plead conclusions.

SAME.—Making Inquiries for Evidence.—Where the diligence alleged consists in making inquiries for evidence, it is necessary to state time, place and circumstances of making the inquiries.

SAME.—Materiality of Newly Discovered Evidence.—The complaint must show the materiality of the newly discovered evidence, and show, also, a strong probability that if a new trial should be granted it would change the result.

SAME.—Cumulative Evidence.—New trials will not be granted to permit the introduction of merely cumulative evidence, and evidence of the same kind, addressed to the same point, is cumulative.

SAME.—Admissions.—Where admissions of a party to the same point are given in evidence on the trial, other admissions of a similar character and to the same point are cumulative.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts, W. R. Fertig and W. Neal, for appellants.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker, E. Daniels, D. Turpie, D. Moss, R. R. Stephenson, H. A. Lee, T. J. Kane and T. P. Davis, for appellee.

100	315
126	374
100	315
122	280
100	315
130	529
100	315
133	368
100	315
134	494

100	315
143	621
100	315
144	391
145	6
100	315
149	14

100	315
158	879
100	315
165	157
165	159

100	315
170	653

100	315
171	101

Hines *et al.* v. Driver.

ELLIOTT, J.—The appellee's complaint seeks a new trial on the ground of newly discovered evidence. Its sufficiency was questioned by a demurrer in the court below, and the appellants insist that their demurrer ought to have been sustained.

The case has already received consideration upon a motion made by the appellee to dismiss the appeal, and it was then held, after a very careful and full investigation, that a proceeding seeking a new trial, commenced after the expiration of the term, was an independent one. *Hines v. Driver*, 89 Ind. 339. We have no doubt of the correctness of the conclusion then announced. As the proceeding is a new and independent action, it requires a complaint; it is, indeed, expressly required by the statute, and has been so held by our own and other courts. In *Glidewell v. Daggy*, 21 Ind. 95, it was said, in speaking of an application for a new trial made after the close of the term: "It is by complaint, and the complaint must show, on its face, a case for a new trial, so that, should it be demurred to, and thereby be admitted, the court would act finally upon it. It must contain, in allegation, what must be shown in proof." The court, in *Sanders v. Loy*, 45 Ind. 229, declared that the proceeding was an independent one, and held that an issue must be formed on the complaint, and tried by the court, and the judgment was reversed because the court erred in overruling the demurrer. In *Hiatt v. Ballinger*, 59 Ind. 303, it was held that the proceeding was an independent one, and that the demurrer to the complaint was properly sustained. But it is unnecessary to make further extracts from the adjudged cases in this court, for they uniformly hold that the proceeding is an independent one, that it is by complaint, and that the sufficiency of the complaint may be tried by demurrer. *Allen v. Gillum*, 16 Ind. 234; *Huntington v. Drake*, 24 Ind. 347; *Rickart v. Davis*, 42 Ind. 164; *Bartholomew v. Loy*, 44 Ind. 393; *Shigley v. Snyder*, 45 Ind. 543; *Roush v. Layton*, 51 Ind. 106; *Cox v. Harvey*, 53 Ind. 174; *Trustees, etc., v. Reynolds*, 61 Ind. 104; *Burton v. Harris*, 76 Ind. 429; *Kitch v. Oatis*, 79 Ind. 96.

Hines *et al.* v. Driver.

It is so held elsewhere. *Cohol v. Allen*, 37 Iowa, 449. As a complaint is required, it must be such as will withstand a demurrer, and in order that it may be sufficient to do this, it must properly plead such facts as show the applicant entitled to a new trial. It is a familiar rule of pleading, that a demurrer admits only such facts as are sufficiently pleaded, and the question which in this instance arises under the rule is, whether the affidavits of witnesses and the bill of exceptions containing the evidence given on the former trial and filed with the complaint form part of it in such a manner as to be deemed sufficiently pleaded. The general rule undoubtedly is that a paper not the foundation of an action can not be made part of a pleading by filing it as an exhibit. This rule is a statutory one, and is firmly supported by the decided cases. *Cassaday v. American Ins. Co.*, 72 Ind. 95, see auth. p. 99; *Clodfelter v. Hulett*, 72 Ind. 137; *Stahl v. Hammontree*, 72 Ind. 103; *Briscoe v. Johnson*, 73 Ind. 573; *Carter v. Branson*, 79 Ind. 14. Where, however, the instrument is properly made an exhibit, and thus incorporated into the complaint, it will not only aid the averments of the pleading, but will often control them. *Bayless v. Glenn*, 72 Ind. 5; *Parker v. Teas*, 79 Ind. 235, see auth. p. 238. But, while the general rule is that stated, there are many exceptions to it. A complaint for review not only may but must set out a transcript of the proceedings, and this is properly done by way of making it an exhibit. So, when a construction of a will is asked, the will may be set out as an exhibit. So, where the correction of a written instrument is asked, it is properly made an exhibit. We think the present case also forms at least a partial exception to the general rule. It is settled by the decisions to which we have referred, that the complaint for a new trial must set forth the evidence given on the former trial, and also the affidavits of the witnesses from whom the newly discovered evidence is expected to be elicited in case of a new trial. The case is therefore very plainly distinguishable from one in which the evidence is not re-

Hines et al. v. Driver.

quired to be set out. The difference between the cases governed by the general rule becomes more striking, when it is brought to mind that ordinarily it is improper to plead evidence; while, in such a case as this, it is not only proper, but indispensably necessary. As the evidence must be pleaded, it is only necessary to plead the instruments which contain it. Any other rule than this would uselessly encumber the record, for it would require the instruments to be made exhibits and the evidence itself to be rehearsed in the body of the complaint, and, surely, no good purpose would be accomplished by such a practice. In many of the cases cited, the evidence, new and old, was made part of the complaint by exhibits, and the practice was impliedly, if not expressly, recognized as the correct one. In the case of *Trustees, etc., v. Reynolds, supra*, the rule we have stated was declared in a very emphatic way, for it was held that the statements of the exhibit would control the averments in the body of the complaint. This can only be correct to the extent that such exhibits form parts of the complaint, and the decision does not profess to carry it further.

It is an elementary principle, that where an instrument is properly referred to, it becomes part of the pleading making the reference, and thus enters into the record. *Broom Legal Maxims*, 522. This principle is a familiar one in the chancery practice, and is recognized in numerous cases in our own reports. The question is, whether the instruments are such as may properly be made exhibits; if they are, then, when made exhibits, they form part of the pleading, and are, of course, in the record; if they are not proper exhibits, they are no part of the pleading, so that the controversy turns upon the question whether the instruments are proper exhibits or not.

While we hold that the affidavits and the bill of exceptions containing the evidence given on the former trial may be made exhibits, we hold, also, that they are only part of the pleading, for the single purpose of showing the former evidence and the newly discovered evidence. The exhibits can be al-

lowed no greater force than this. They can not be resorted to for the purpose of aiding the complaint in any other particular; their effect must be confined to a statement of the original and the newly discovered evidence; all the other facts essential to the validity of the complaint must be stated in the body of that pleading as in ordinary cases.

The complaint in *Hill v. Roach*, 72 Ind. 57, was for a review, and was not a complaint for a new trial, and it was rightly held that the complaint must be tried by the averments in the body of it, and not by the recitals in the affidavit of a witness. A complaint for a new trial is for newly discovered evidence; while a complaint for a review is for newly discovered matter, and the newly discovered matter must be stated in the body of the complaint. The difference between the two cases has been many times explained; among the cases explaining it are *Hall v. Palmer*, 18 Ind. 5, *Fleming v. Stout*, 19 Ind. 328, *Webster v. Maiden*, 41 Ind. 124, see p. 130, and *Barnes v. Dewey*, 58 Ind. 418. As said in *Nelson v. Johnson*, 18 Ind. 329, "New matter is a different thing from new evidence. Matter, as the word is used in law, means a fact or facts constituting the whole or a part of a ground of action or defence."

The exhibits incorporated into the complaint by way of reference are to be regarded as sufficiently pleading the new testimony and the evidence given on the former trial, and they, therefore, state two essential elements of the plaintiff's case, the newly discovered evidence and the evidence on the former trial, but they do no more.

It remains to ascertain whether the other elements of a cause of action are found in the body of the complaint, for, if not found there, they do not exist. The facts out of which the litigation arose are stated in the opinion deciding the case when it was here for the first time. *Hines v. Driver*, 72 Ind. 125. The contest was over the question whether Driver had falsely represented the amount of the indebtedness of the firm of which he was a member, to induce Hines to buy that interest,

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it being contended by the latter that Driver had represented the indebtedness of the firm to be \$1,500, whereas it amounted to \$4,800. The first trial resulted in a verdict and judgment in favor of Driver, but this judgment was reversed (*Hines v. Driver, supra*); after the case got back into the trial court it was again tried, and a verdict and judgment rendered in favor of the appellants. The appellee secured a new trial upon the same ground as that upon which he now seeks one, namely, newly discovered evidence, and a third trial was had, and he was again defeated.

The appellee, having once secured a new trial upon the ground of newly discovered evidence, must show a very strong case, or he can not again have a new trial upon the same ground. Society has an interest in matters such as this, for it is not permissible to disturb the repose of society by continued litigation. If new trials were lightly granted in cases like this, the interests of society would be injuriously affected and the administration of public justice greatly disturbed. But the adverse party is also entitled to have an end put to the litigation and his legal rights finally established. The good of society, as well as the interests of litigants, requires that a party should be diligent in securing, not part, but all of his evidence, in order that one action may settle the controversy. If lax rules were to prevail, then great delays and protracted and vexatious litigation would be the consequence. If a defeated litigant could obtain a second new trial upon the ground of newly discovered evidence, without a strong, clear and satisfactory showing of diligence, of the materiality of the evidence, and of the probability that it would change the result, there would be a temptation to great wrongs, and such a procedure would lead to grave abuses. A party who has had two trials can not obtain a third without making out, in every respect, a strong case. He has a much heavier burden than an applicant who asks a new trial for the first time, although the burden of such a party is by no means a light one. Even where the application is made for the first time, and the

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ground upon which it is placed is that of newly discovered evidence, it is looked upon with much disfavor and entertained with great reluctance. In one case it was said: "Motions of this kind ought to be received with great caution, because there are few cases tried, in which something new may not be hunted up, and because it tends very much to the introduction of perjury, to admit new evidence after the party who has lost the verdict, has had an opportunity of discovering the points both of his adversary's strength and his own weakness." *Moore v. Philadelphia Bank*, 5 S. & R. 41. In another case it was said: "It is infinitely better that a single person should suffer mischief than that every man should have it in his power, by keeping back part of his evidence and then swearing it was mislaid, to destroy verdicts and introduce new trials at their pleasure." To a similar effect is the language of the court in *Baker v. Joseph*, 16 Cal. 173: "Applications for this cause are regarded with distrust and disfavor. The temptations are so strong to make a favorable showing, after a defeat in an angry and bitter controversy involving considerable interests, and the circumstance that testimony has just been discovered, when it is too late to introduce it, so suspicious, that courts require the very strictest showing to be made of diligence, and all other facts necessary to give effect to the claim." The law favors the diligent and punishes the sluggards. Its policy is to compel parties to be ready for trial and to try their causes at the time appointed, and to so try them as that all the evidence they can procure shall be introduced and the litigation finally terminated. A party who seeks to reopen the litigation on the ground that he has discovered new evidence must, for the reasons stated, be prepared to establish every essential element of such a case strongly, clearly and satisfactorily.

The complaint before us fails in many essential respects. It does not show that the evidence was not discovered during the term at which the verdict and judgment sought to be set

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aside were rendered. Where evidence is discovered during the term, the defeated party must apply by motion for a new trial; he can not delay until the close of the term and then proceed by complaint. The two methods of procedure are materially different. One is an independent proceeding; the other is an ancillary proceeding in a pending cause. *Trustees, etc., v. Reynolds, supra*. If a party neglects to proceed by motion in a pending case, when that is the proper course, he can not after the close of the term institute an independent proceeding. It is not sufficient to allege that the evidence was not discovered until after the trial; it must be averred that it was not discovered during the term. *Hiatt v. Ballinger*, 59 Ind. 303. "In a complaint for a new trial," said the court in a recent case, "after the term at which the judgment was rendered, it must be shown that the new evidence, by the use of due diligence, could not have been found in time for the trial, nor before the close of the term." *Ragsdale v. Matthews*, 93 Ind. 589.

The complaint is insufficient for the further reason that it does not state the facts constituting diligence. It is evident from what we have said upon the general subject of new trials on the ground of newly discovered evidence, that the courts are very strict in requiring a full statement of the facts constituting diligence. In one of the earliest decisions of this court, it was said by one of the first judges of the State: "In listening to such applications, courts of justice have always been extremely cautious, and have uniformly overruled them, where, upon using due diligence, the evidence might have been discovered before." *Coe v. Givan*, 1 Blackf. 366. A text-book of excellent standing contains this statement of the rule: "The strong presumption is, that by proper effort, the party might have discovered the evidence and used it on the trial; and that his not having done so, is owing either to intentional omission, or to unpardonable neglect. To rebut this presumption, he must make out a case free from delinquency. His excuse must be so broad as to dissipate all

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surmise to the contrary." 3 Graham & Waterman New Trials, 1026. Our decisions holding that the facts constituting the diligence must be specifically stated are far too numerous for citation. In one of the latest cases upon the subject it is said: "In such case, general averments in the complaint are not sufficient. The facts constituting the diligence must be stated." *McCauley v. Murdock*, 97 Ind. 229. In one of the earliest cases upon the subject it was said of diligence, that it "is a matter of law arising out of the facts of the case, which facts must be set out that the court may determine whether they show due diligence or not." *Harrington v. Witherow*, 2 Blackf. 37. In a treatise on practice the conclusion deducible from the adjudged cases is thus stated: "The facts constituting the diligence must be shown in support of the motion." 1 Works Pr., section 920.

Where the diligence used is alleged to have consisted in making inquiries, the time, place and circumstances must be stated. The reason for this rule is obvious. The applicant for a new trial must rebut the presumption existing against him, and this he can only do by showing that he made inquiries in the proper quarter and in due season. In speaking of the necessity of showing what inquiries were made and their character, it was said in *Toney v. Toney*, 73 Ind. 34, that "The general statements of the appellant in his affidavit, that he had been diligent in making inquiries of such as he deemed likely to know anything in relation to the case, are not sufficient to overcome the manifest presumptions against him, arising out of the suggestions above mentioned." In *Wall v. State, ex rel.*, 80 Ind. 146, the allegations were much fuller than those in the complaint before us, and they were held insufficient. So, in *Ragsdale v. Matthews, supra*, where the allegations in the complaint were very much stronger than here, it was held that they were insufficient, the court saying: "Conclusions, not facts, are stated. The facts constituting the diligence are not given." The cases elsewhere are even stronger than our own, but we have not time to do more

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than refer to a few of the many we have examined. In *Carson v. Cross*, 14 Iowa, 463, it was said: "A general allegation that a party used due diligence to obtain testimony is not sufficient. He must show what he did do, that the court may judge of its sufficiency." The statements of the affidavit in *Smith v. Williams*, 11 Kan. 104, were much stronger and fuller than those in the present case, but they were held insufficient, the court saying: "All the evidence of diligence presented is the mere allegation in the affidavit that the party made inquiry of every person he thought might know anything about the case, and failed to obtain this evidence, and that he has used due diligence. This is virtually swearing to a conclusion." Of a similar case it was said by another court: "On a question of diligence like this, a party ought to negate every circumstance from which negligence may be inferred." *Crozier v. Cooper*, 14 Ill. 139. It was held in *Gregg v. Bankhead*, 22 Texas, 245, that in a complaint for a new trial after the term the rule was even more strict than where the application was by motion during the term.

The newly discovered evidence, in order to warrant a new trial, must be of a very material and decisive character. This must appear from the affidavits of the witnesses; it is not sufficient that it is stated in the body of the complaint. The rule is thus stated in a work on practice: "The mere statement of the evidence will usually show whether or not it is material. Where this appears from the evidence alone, it is sufficient. But where it does not so appear on its face, its materiality must be shown. If the evidence shows upon its face to be immaterial, a statement in the motion or affidavits in support thereof, that it is material, will be disregarded." 1 Works Pr., section 921.

The authorities go very far in requiring that the newly discovered evidence must be of a material character; some of them, indeed, go to the length of requiring that it must be such as to make it conclusively appear that if given it would change the result; but this is, perhaps, an extreme view. It

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is, however, very firmly settled that the evidence must be of a decisive character, and be such as to make it clearly and fully appear that it would produce a different result. In *Fox v. Reynolds*, 24 Ind. 46, it was said: "To authorize a new trial under such circumstances, the newly discovered evidence ought to be very controlling in its character, and free from any legal objection." In *Merryman v. Ryan*, 24 Ind. 262, it was held that the evidence was not of sufficient materiality to warrant a new trial, because, as the court said, "The newly discovered evidence was cumulative, and was not the turning point in the case." A text-writer says of such evidence, that it "must be such as ought to be decisive, and productive, on another trial, of an opposite result." Hill. New Trials, 491. In *Southard v. Russell*, 16 How. 547, it was said: "The rule, as laid down by Chancellor Kent (3 Johns. (N. Y.) Ch. 124), is, that newly discovered evidence, which goes to impeach the character of witnesses examined in the original suit, or the discovery of cumulative witnesses to a litigated fact, is not sufficient. It must be different, and of a very decided and controlling character. 3 J. J. Marsh. (Ky.) 492; 6 Madd. 127; Story Eq. Pl., section 413. The soundness of this rule is too apparent to require argument, for, if otherwise, there would scarcely be an end to litigation in chancery cases, and a temptation would be held out to tamper with witnesses for the purpose of supplying defects of proof in the original cause." Another court said of such evidence, after characterizing it as cumulative: "But if it were not, we do not think it is so conclusive in its character as to raise a reasonable presumption that the result of a second trial would be different from the first." *Armstrong v. Davis*, 41 Cal. 494, see p. 500. The New York rule is thus stated: "A new trial will not be granted unless the newly discovered evidence be so decisive in character that it will be productive, on another trial, of an opposite result." *Schultz v. Third Avenue R. R. Co.*, 47 N. Y. Superior Ct. 285. *Starin v. Kelly*, 47 N. Y. Superior Ct. 288; *Darbee v. Elwood*, 67 Barb. 359; *Fowler v. Kelly*, 43

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N. Y. Superior Ct. 380. In *Smith v. Shultz*, 1 Scammon, 490, S. C., 32 Am. Dec. 1, it was said of the duty of the court: "Nor will it, upon the application of the defendant, afford him an opportunity of introducing newly discovered testimony, which is not conclusive in its character, or is merely cumulative." In some of our decisions the rule is less strongly stated, but all of the cases agree that the newly discovered evidence must be of such a character as to make it obvious that a different result would be produced on another trial, or, as some of them say, "raise a violent presumption" that it would change the result. *Hull v. Kirkpatrick*, 4 Ind. 637; *Taylor v. State*, 4 Ind. 540; *Rainey v. State*, 53 Ind. 278. But, whatever may be the correct form of expressing the rule, it is undoubtedly true, as said in *Swift v. Wakeman*, 9 Ind. 552, "In such applications, the party seeking a new trial must make a strong and clear case." We are satisfied that the case before us can not be regarded as a strong and clear one upon the point of the materiality of the newly discovered evidence, even if it were a first application for a new trial on that ground, for the newly discovered evidence is of general admissions, not clearly stated, nor decisive in their effect.

The burden is heavier in such a case as this than where the applicant is for the first time asking a new trial. The law upon this subject is thus clearly stated by an able court: "It will require an extreme case to justify this court in granting a second rule, after the right of a party to a re-trial has been deliberately considered and denied. The newly discovered evidence should not only be so persuasive as to scarcely leave it debatable that the verdict is wrong, but also such evidence as the most careful inquiry and preparation of the case for the trial at the circuit, and for the first rule to show cause, would have failed to bring to the knowledge of the party which seeks to prolong the litigation." *Miller v. Ross*, 43 N. J. L. 552. The case in hand is much stronger against the applicant than the one referred to, for here a new trial was once granted him on the ground of newly discovered evidence, a

second verdict rendered against him, and a motion for a new trial overruled.

That a new trial will not be granted to permit the introduction of merely cumulative evidence is too well settled to need the citation of authorities or the discussion of principles. The only question on this branch of the case is, whether the evidence was cumulative. The newly discovered evidence is, as we have seen, that the appellants made verbal admissions regarding the amount of the indebtedness of the partnership in which he had purchased an interest from the appellee. This was, as we have stated, the real point in controversy, and evidence was given upon it by the appellee, and part of that evidence consisted of admissions made by the appellants of a similar import to those set forth in the affidavits filed in this case. There was, therefore, evidence of the same fact, and it was of precisely the same character as that contained in those affidavits. We think it quite clear that the evidence was merely cumulative. Professor Greenleaf defines cumulative evidence thus: "Cumulative evidence is evidence of the same kind, to the same point. Thus, if a fact is attempted to be proved by the verbal admissions of a party, evidence of another verbal admission of the same fact is cumulative." 1 Greenl. Ev., section 2. This definition has been many times approved by this court. *Lefever v. Johnson*, 79 Ind. 554; *Shirel v. Baxter*, 71 Ind. 352; *Winsett v. State*, 57 Ind. 26; *Cox v. Harvey*, 53 Ind. 174; *Zouker v. Wiest*, 42 Ind. 169. There can be no doubt that this is an accurate definition, for so all the authorities agree. Hill. New Trials, 491, auth. n. a.; 3 Graham & W. New Trials, 1052; Hayne New Trials, section 90; Buskirk Pr. 242.

The only possible question is, whether an admission testified to by a different witness, but being of the same class as that to which some of the evidence given on the trial belonged, and tending to prove the same fact as that which the evidence adduced on the trial tended to prove, is or is not cumulative. We think that our own decisions, as well as the de-

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cisions of other courts, settle this question against the appellee. In *Cox v. Harvey*, *supra*, the court said: "On the trial, admissions of the defendant were given in evidence by the plaintiff, tending to show that he was liable on the note as one of the firm. The newly discovered evidence consists of other admissions made by the defendant having the same tendency. This is cumulative evidence."

In *Shirel v. Baxter*, *supra*, this language was quoted, approved, and held to be decisive of the case then under examination. The case last referred to is substantially such a case as the present, and is governed by the same general principles, so that these cases are of controlling influence here. The question was presented in *Den v. Wintermute*, 13 N. J. (1 Green) 177, where the court, in speaking of newly discovered evidence of admissions, said: "This is what is called cumulative or additional evidence, to fortify a point which has been already tried, in order to make it stronger; which has been repeatedly refused as any ground for a new trial." Quite as strongly in point is the case of *Gans v. Harmison*, 44 Wis. 323, where it was said: "The newly discovered evidence consisted, in part, of the alleged admissions of the plaintiff to Whittier and Mason, to the effect that he sold the team to Tuttle. But it is evident that this was strictly cumulative to admissions proven by the witness Madison on the trial."

The only cases cited by the appellee's counsel upon this point are *Lefever v. Johnson*, *supra*, *Rains v. Ballow*, 54 Ind. 79, *Humphreys v. Klick*, 49 Ind. 189. The first of these cases is as directly against counsel's contention as a decision could well be, for the rule declared in *Harvey v. Cox*, *supra*, is fully approved, and it was held that admissions, although made to a different witness, were cumulative if of the same class as those proved on the trial. The decision in *Rains v. Ballow*, *supra*, is, that "admissions of a party of a given fact are not cumulative of other evidence tending to prove the same fact," and this is all that is decided in *Humphreys v. Klick*, *supra*. It is evident that these cases are not in point, because the evi-

dence here is of admissions of the same class and to the same fact as those proved on the trial. If there had been no such admissions proved, then the cases cited would have been in point, for the reason that there would have been no evidence of the class to which the newly discovered evidence belongs. That this is a correct interpretation of the decision in *Humphreys v. Klick*, *supra*, is apparent from an examination of the case of *Humphries v. Adm'rs of Marshall*, 12 Ind. 609, where Greenleaf's definition was expressly and fully approved, and WORDEN, J., said that evidence of admissions was not cumulative, because "it was of a totally different kind" from that introduced on the trial, although it went to the same point. Another of the cases cited in *Humphreys v. Klick*, *supra*, is *Zouker v. Wiest*, *supra*, where there is a like approval of Greenleaf's rule, and the court held, where the plaintiff himself had testified as to admissions, that evidence of similar admissions, although made to other parties, was merely cumulative. But the language of the decision in *Humphreys v. Klick*, *supra*, is itself sufficient to show that it does not support appellee's contention, for it was there said: "The evidence, although directed to the same point as that of Humphreys on the former trial, in respect to the point that he was not to sue on the note, is altogether different in kind. It is, therefore, not cumulative merely." In *Kochel v. Bartlett*, 88 Ind. 237, Greenleaf's rule was again approved, and it was held that the newly discovered evidence was not cumulative, for the reason, as the court said, "If the newly discovered evidence had been produced at the trial, it would have tended to prove the same substantial facts as those to which the testimony of all the other witnesses for the plaintiff was directed, but in a materially different way." We have shown that throughout all our cases one controlling principle runs, and that is, that evidence of the same kind to the same point is cumulative, and evidence of verbal admissions is of the same kind when other verbal admissions to the same point were proved on the trial, but

that evidence to the same point is not cumulative where it is of a different kind or class.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

Filed Feb. 12, 1885.

No. 12,003.

BAKER v. CARR.

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PRACTICE.—*Supreme Court.*—*Weight of Evidence.*—Where there is some evidence tending to sustain the verdict, the judgment will not be disturbed by the Supreme Court on the weight of the evidence.

SAME.—*Harmless Error in Rejecting Evidence.*—The rejection of a proper question will not warrant the reversal of a judgment, where it is apparent that the party was not injured thereby.

EVIDENCE.—*Principal and Agent.*—*Statements of Agent.*—Where an agent's authority is not general, but special only, the statements of such agent as to any matter outside the scope of his agency will not bind the principal.

From the Fulton Circuit Court.

J. S. Slick and *I. Conner*, for appellant.

M. L. Essick and *G. W. Holman*, for appellee.

BICKNELL, C. C.—In this case the appellee claimed \$126.85 for sawing 31,713 feet of ash lumber for the appellant, at \$4 a thousand. The defendant answered in two paragraphs, to wit:

1. A general denial.
2. That in August, 1883, the plaintiff and defendant had a settlement of all accounts, upon which the defendant was found indebted to the plaintiff in the sum of \$8, which he paid before the commencement of this suit.

The plaintiff replied in two paragraphs, viz.:

1. A denial.
2. Admitting a settlement, but alleging that it did not embrace the account sued on.

A jury found a verdict for the plaintiff for \$86.85. The defendant's motion for a new trial was overruled; judgment

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was rendered on the verdict, and the defendant appealed. The error assigned is overruling the motion for a new trial.

The only reasons for a new trial relied on for the reversal of the judgment, and discussed by the appellant in his brief, are the fourth, the third specification of the fifth, the sixth and the seventh.

The seventh is that the verdict is not sustained by sufficient evidence.

The appellant claimed that he agreed with one Shively to pay him for lumber delivered at the appellant's lumber yard, at the rate of \$20 per thousand for firsts and seconds, and \$8 per thousand for cullings, and that as Shively had no money to pay for either logs, or sawing, or hauling, the appellant agreed with him to accept and pay his orders in favor of the parties furnishing the trees, or sawing, or hauling, and deduct the amount of such orders from the price of the lumber delivered, and that no such orders were given to the appellee, and that no logs were ever sawed by the appellee for the appellant.

The appellee claimed that he sawed the logs for the appellant at his request; that the appellant admitted that the logs were his, and promised to pay for them.

The appellant says in his brief: "This is not a case of conflict in the evidence; there is no evidence tending to support the verdict."

The appellant testified as follows: "I wrote this letter; it is in these words:

"' ROCHESTER, IND., March 15th, 1883.

"' MESSRS. CHANDLER & TAYLOR—*Sirs*—I understand that you have a claim against Mr. John Carr for saw-mill, and are about to close up on him. I write you in order to get you to hold on a short time yet, as the winter has been very close and he could not saw. I have about 50 M feet for him to saw, and will pay him as fast as he gets it sawed. I don't advance on saw bills. I understand that he has commenced to saw my logs now.

Yours truly,

"' A. BAKER.'"

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The appellee testified: "I sawed lumber for Baker, 31,713 feet at \$4 per thousand; he has not paid me all; he paid me \$40; Baker told me he would give \$4 per thousand feet; he said a certain amount of logs he had at the mill; Baker had no logs there except what were brought there by Shively; I know where the logs came from; some came from Nelson's, some from Mickey's and some from Drudges'; Baker spoke of the Nelson and Mickey timber and said that was his; he said Shively was buying for him; I had asked Baker for my money; he would not pay because I had no order; he claimed I did not saw that much lumber; he said he would pay for all that had come on the yard; he said he never paid without an order from Shively, or when Shively was indebted to him."

William Shively testified: "I bought the timber for Baker; he said, 'you are working for me;' he said for Carr to go on, and he would pay as soon as it was sawed; he said he would not advance money; he also said he agreed to pay the saw bill and he was going to do it; in conversation about the timber Baker claimed to own it."

There was no conflict as to the quantity of sawing done, or as to price of it, or as to the amount paid having been \$40. The foregoing testimony tended to sustain the verdict, and therefore the judgment can not be disturbed by this court on the weight of the evidence.

There was some testimony tending to support the position taken by appellant, to wit, that he was liable for the sawing to Shively only and had no contract with the appellee, but in such a conflict this court can not interfere. *McCarty v. Waterman*, 96 Ind. 594.

The fourth reason for a new trial is that the court erred in rejecting a question proposed to be put by the appellant to the witness Shively, as follows: "How many orders, if any, did you give the plaintiff Carr, directing the defendant Baker to pay money to Carr upon the saw bill?"

Inasmuch as there was some evidence tending to show that

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Baker was to be liable only upon orders given by Shively, and as the jury might possibly have adopted that view, we think the court erred in rejecting the question under consideration, but the result showed that it was a harmless error. The verdict shows that the jury must have found that the logs belonged to Baker, and that he was primarily liable for the sawing thereof; that being so, it was altogether immaterial how many orders Shively gave or whether he gave any. The rejection of a proper question will not in such a case warrant the reversal of a judgment, the record not showing that the party was injured thereby. *Lett v. Horner*, 5 Blackf. 296; *Higgins v. State*, 7 Ind. 549; *Indianapolis, etc., Co. v. Herkimer*, 46 Ind. 142.

The third specification of the fifth cause for a new trial is, that the court erred in rejecting the following question proposed to be put by the appellant to the witness McDougal: "State what, if anything, did Moses McGee say at the settlement of that account, concerning it, and what the plaintiff Carr had authorized him to do about the account?"

It appeared that there had been dealings between Carr and Baker distinct from the account sued on. Carr had sold some lumber to Baker and had done some hauling for him. McGee was Carr's teamster in the hauling, and he was then acting for Carr, not as his general agent, but in reference to that lumber and hauling only. He was not shown to be Carr's agent as to any other matter, and what he said as to any other matter could not affect Carr. There was no error in this refusal.

The sixth reason for a new trial is, that the court sustained an objection to the following question proposed to be put to the appellant Baker by his counsel: "What is the fact as to there being anything due from you to Shively on the lumber furnished by Shively under his contract with you, on the 22d day of August, 1883? Was there ever a time when you were owing Shively for the lumber under this contract, when he drew an order in favor of plaintiff Carr, which you refused to pay?"

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What has already been stated as to the fourth reason for a new trial may be repeated as to this sixth reason, viz., as there was some evidence tending to show that the appellant was not the purchaser of the logs, and was to pay the saw bill out of the price of the lumber payable to Shively, and then only on Shively's orders, and as, when this question was proposed, it could not be foreseen that the jury would not adopt the appellant's view of the testimony, it was proper for the appellant to show that Shively had been fully paid for the lumber at the time of the commencement of this suit, and had never given the plaintiff any orders, when he had anything due him, which were not paid by the defendants. The questions now under consideration were, therefore, erroneously rejected, but such error was harmless, because the verdict shows that the jury adopted the appellee's view of the testimony, and held that Baker was the owner of the logs and primarily liable to pay for the sawing thereof. In that view of the case, these questions were clearly altogether immaterial, and the rejection of them was a harmless error.

We find no available error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Feb. 12, 1885.

 No. 11,384.

MITCHELL v. FRENCH ET AL.

RES ADJUDICATA.—A judgment is only conclusive upon matters within the issues, and not on after-occurring facts not involved in the suit in which the judgment was rendered.

SAME.—*Evidence*.—It will be presumed that the questions involved in the issues in a former action were tried therein, and oral evidence of such fact is harmless.

From the Morgan Circuit Court.

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Mitchell v. French *et al.*

J. V. Mitchell, J. F. Cox, W. R. Harrison and W. E. McCord, for appellant.

G. W. Grubbs, M. H. Parks, G. A. Adams and J. S. Newby, for appellees.

BLACK, C.—On the 18th of September, 1874, Henry Sheplor purchased from one Henry H. Haase, and the latter conveyed to the former, certain land in Morgan county. In November, 1874, and in 1875, said Sheplor, as guardian of Dora I. Sheplor, Seymour A. Sheplor and Darius E. Sheplor, minors, received certain moneys of the estates of his said wards, and thereafter he used money so received in making payment of purchase-money for said land. Afterwards, in November, 1875, the First National Bank of Martinsville recovered a personal judgment against said Henry Sheplor, in the circuit court of said county, which, therefore, was a lien on said land. On the 22d of January, 1876, said Henry Sheplor conveyed said land to his said wards in payment of their money invested by him as aforesaid. On the 24th of March, 1879, under an execution issued on said judgment, said land was sold by the sheriff to James M. Mitchell.

Said Dora I. Sheplor became the wife of Edward French, and she with her said husband and said Seymour A. and Darius E. Sheplor brought their suit against said Henry Sheplor, the First National Bank of Martinsville, James M. Mitchell and others, in said circuit court, and such proceedings were had that on the 12th of December, 1879, judgment was rendered by said court in said cause, that the plaintiffs therein should take nothing by their suit, and that the defendants therein should recover their costs of said plaintiffs. From this judgment said plaintiffs appealed to this court, and said judgment was affirmed. See *French v. Sheplor*, 83 Ind. 266 (43 Am. R. 67). After the rendition of said judgment, and before the expiration of one year after said sheriff's sale, said Dora I. French and Seymour A. and Darius E. Sheplor paid to the clerk of said circuit court the full amount of said

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Mitchell's bid at said sale, with ten per cent. interest thereon from the date of the sale, for the redemption of said real estate from said sheriff's sale to said Mitchell, and received the clerk's certificate of said payment for such purpose. Afterwards, on the 10th of April, 1880, said sheriff executed a deed of conveyance of said real estate to said Mitchell pursuant to said sale to him.

The questions involved in said action, as will be seen by consulting the opinion of this court, per MORRIS, C., above referred to, and which were determined in the trial court and in this court against the plaintiffs in said action, were, whether said wards were entitled to have a trust in said land declared in their favor, because said guardian, having purchased said land upon his own credit and having taken the conveyance thereof to himself, afterwards, in payment of the purchase-money, in violation of his trust, used the money of his said wards; and whether said wards were entitled to subrogation to the rights of the holders of liens existing on said land from or before the time of said guardian's purchase thereof, which he afterward paid off with such money of his wards.

The action now at bar was one brought by said Mitchell in 1882 to quiet his title to said land. Under a cross complaint of said Dora I. French and Seymour A. and Darius E. Shepler, the court found in their favor and rendered judgment quieting their title to said land. The controlling question before us is whether said defendants were estopped by said former judgment from asserting title to said land upon the facts which we have stated. We think that this question must be determined against the appellant.

The issues decided in the former action did not involve the cause of action in this suit. In the former case, the plaintiffs therein were claiming, as to the interest of said Mitchell under said sheriff's sale, that they had an equitable interest in said land because of the use of their money by their guardian in paying his indebtedness for purchase-money and in discharg-

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ing liens thereon, and that the interest of said Mitchell under his purchase at sheriff's sale, having been acquired by him with notice of such equitable interest, was subordinate to it.

In the case at bar, the claim of the defendants under their cross complaint recognizes the ownership of said land by said Henry Sheplor at the date of the judgment in favor of said bank and the validity of the sale of the land as his property by the sheriff to said Mitchell. The conveyance of the land in 1876 to the appellees by said Henry Sheplor, in consideration of his use of their money in the purchase thereof by him, gave them a right to redeem from said sheriff's sale; and it is upon said redemption that their claim of title is based in this action. This fact, which was not involved in the former suit, and which has occurred since the rendition of the judgment therein, makes, with the other facts stated, a cause of action for the appellees; whereas, as appears from the decision of this court above cited, their complaint in the former action showing said other facts failed to state a cause of action for them; therefore, it can not be claimed that the cause of action now presented by the appellees is *res judicata*.

On the trial, the court permitted an attorney in the former action to testify for the appellees as to the questions litigated therein. The testimony so given was in agreement with the record of said former action already in evidence, and, in effect, merely showed by oral evidence, that the questions involved in the issues in that action were tried therein. This would have been presumed without the oral evidence. The prior case having been relied upon by the appellant as a former adjudication of the matter presented in this case by the appellees, the record of the former action sufficiently proved the contrary; and the oral evidence, which could not have produced a result different from that which must have been reached without it, did not harm the appellant.

The judgment should be affirmed.

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PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed Feb. 25, 1885.

 No. 11,354.

HOLZMAN ET AL. v. HIBBEN ET AL.

PLEADING.—*Joint Demurrer.*—*Parties.*—A party against whom a cause of action is shown can not demur to the complaint because no cause of action is shown against some other defendant. And so, where there is a joint demurrer, and a cause of action is shown against any one of the parties demurring, the demurrer must be overruled.

PARTIES.—*Joint Interest of Plaintiffs.*—Where there are several plaintiffs, a joint interest in each and all of them must be shown, in order to a recovery.

DECEDENTS' ESTATES.—*When Heirs may Collect Debts.*—Where there is no administration, and there are no debts to pay, the heirs may collect the debts payable to their deceased ancestor.

COSTS.—*Postponement of Trial.*—*Judgment.*—A preliminary judgment against defendants on a motion to postpone trial to a day in term, for all the costs of the term, is erroneous. It should be only for the costs caused by the delay.

From the Fulton Circuit Court.

J. S. Frazer, W. D. Frazer and J. S. Slick, for appellants.

M. L. Essick, G. W. Holman, C. Byfield, L. Howland and L. L. Norton, for appellees.

FRANKLIN, C.—Appellees sued appellants on account for goods sold and delivered. A joint demurrer was overruled to the complaint, and appellants each filed a separate general denial. There was a trial by jury, verdict for the plaintiffs, and over a motion for a new trial judgment was rendered upon the verdict.

The errors assigned are, overruling the demurrer to the complaint, rendering judgment against appellants for all the costs of the term, and overruling the motion for a new trial.

The demurrer to the complaint is joint by all the defendants, and only for the cause of the want of sufficient facts stated.

100	338
231	477
100	338
135	618
100	338
150	314
150	342
100	338
164	476

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The suit is by the plaintiffs as partners, and against the defendants as partners. The complaint avers that one member of the late firm of plaintiffs, since the commencement of the suit, had died, and by leave of the court the complaint had been amended by the substitution of his widow's name in the place of that of the deceased, averring that deceased had willed all his interest in the partnership accounts to such widow, and that all the partnership debts were paid.

The bill of particulars filed with the complaint, as an exhibit, and made a part thereof, is made out and stands against one of the defendants individually.

Under the demurrer, there are two objections presented to this complaint. The first is that the bill of particulars being only against one of the defendants, no cause of action is shown against the other defendants. The second is that no cause of action is shown in favor of one of the plaintiffs (the wife of the deceased partner). The demurrer, being joint by all the defendants, can not raise the first question presented. If in such case there is any cause of action shown against any one of the defendants, the demurrer must be overruled. In order to be available, in such cases, the demurrer must be separately by the defendants, or by the defendants jointly, against whom no cause of action is shown. The party against whom a cause of action is shown can not demur to the complaint because no cause of action is shown against some other defendant or defendants. There is no error in overruling the demurrer for this cause. See the following recent cases: *Rector v. Shirk*, 92 Ind. 31; *Campbell v. Martin*, 87 Ind. 577; *Axtel v. Chase*, 83 Ind. 546; *Carter v. Zenblin*, 68 Ind. 436. Many other cases to the same purport might be cited.

As to the second objection, that no cause of action is shown in one of the plaintiffs, the law is equally well settled by numerous decisions of this court, that under a demurrer stating for cause the want of sufficient facts, the defendants may take advantage of want of sufficient facts as to any one of the plaintiffs. The complaint, in order to constitute a good cause

of action, must show a joint interest and cause of action in each and all of the plaintiffs. The defendants can not be called upon to answer a complaint that only shows a cause of action in favor of a part of the plaintiffs. The payment of a judgment rendered in such a case would not be a payment to the persons justly entitled to receive the same, and would not be a bar to another suit by the parties who were rightfully entitled to collect the same. Hence the erroneously overruling of a demurrer to the complaint in such cases has invariably been held by this court as a good cause for reversing the judgment. We have found no case in this court in which the judgment for this cause was reversed, only as to the plaintiff in whom no cause of action was shown by the complaint. See the cases of *Thomas v. Irwin*, 90 Ind. 557; *Hyatt v. Cochran*, 85 Ind. 231; *Headrick v. Brattain*, 83 Ind. 188; *Martin v. Davis*, 82 Ind. 38; *Schee v. Wiseman*, 79 Ind. 389; *Nave v. Hadley*, 74 Ind. 155; *Harris v. Harris*, 61 Ind. 117; *Parker v. Small*, 58 Ind. 349; *Lipperd v. Edwards*, 39 Ind. 165; *Maple v. Beach*, 43 Ind. 51. Other similar cases might be cited.

It is also well settled that where there is no administration and no debts to pay, the heirs may collect the debts payable to their deceased ancestor. See the case of *Salter v. Salter*, 98 Ind. 522, and the authorities therein cited.

There is no allegation in the complaint under consideration, that there was no administration with the will annexed, or no executor upon the estate of the deceased partner; or that there were no debts against his estate, so as to authorize the legatee, the widow, to sue for a claim willed to her. There is no cause of action shown in such widow. For this reason the court erred in overruling the demurrer to the complaint.

We need not examine the reasons stated for a new trial. They are mostly based upon the rulings of the court in the introduction of, and offering to introduce evidence, and the instructions of the court to the jury. These questions will

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not necessarily, and may not again arise upon a subsequent trial, and we therefore decide nothing in relation to them.

The preliminary judgment rendered against the defendants, upon the motion to postpone the trial to a day in term, for all the costs of that term, is erroneous, it should only have been for the costs caused by the delay. The preliminary judgment as to costs, and the final judgment should both be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment for costs on the motion to postpone the trial, and the final judgment in the case, be and the same are both reversed, at appellees' costs; and that the cause be remanded to the court below with instructions to set aside all the proceedings of the court below back to the ruling upon the demurrer, to sustain the demurrer to the complaint, and for further proceedings.

Filed Dec. 17, 1884. Modified Feb. 12, 1885.

No 9616.

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100	341
146	552
100	341
169	554
170	295

RAILROADS.—Consolidation.—Public Policy.—Under the statutes of this State, railroad corporations may acquire by purchase, or consolidate with, other connecting or intersecting lines; and the organization of a railroad corporation, with the view of ultimately consolidating, upon equitable terms and in accordance with the provisions of the statute, with one already existing, is not against public policy.

SAME.—Buying Stock in other Roads.—Ultra Vires.—A railroad company, having power to consolidate with connecting or intersecting lines, may, under the statute, with a view to accomplishing such consolidation and carrying out the object for which it was created, purchase the stock of such other roads.

SAME.—Equity.—Estoppel.—Persons who constituted a majority of the directors when such purchase of stock was made, can not be heard in equity to question the validity of such purchase.

SAME.—Transfer of Stock.—Sureties.—Indemnity.—A railroad company, merely organized, but without means or credit, purchased stock of another company, giving its notes therefor with sureties, the stock purchased being held by one of the sureties for indemnity. It failed to

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pay its notes at maturity, and its stockholders prevented the making of assessments or calls upon themselves to provide a fund for such payment, the stock purchased then being of less value than was supposed when the purchase was made. Thereupon an arrangement was made by the concurrence of the purchasing company and its sureties, some of whom were its directors, whereby an association of men, including said sureties, took, in good faith, a transfer of the stock, paying therefor the notes which had been given for it.

Held, that the transfer of the stock was not void, and equity would not interfere to set it aside at the instance of stockholders who had paid nothing upon their stock subscriptions.

SAME.—*Forfeiture of Stock for Non-Payment of Calls.*—*Notice.*—The non-payment of calls upon subscriptions for capital stock, if notice of the calls and demand of payment be made, will, without other notice, warrant a forfeiture of the stock under section 3896, R. S. 1881.

PRACTICE.—*Pleading.*—*Complaint.*—*Amendment.*—*Interrogatories.*—When an amended complaint is filed, it supersedes not only the original complaint, but interrogatories filed with it, and in that case it is not error to refuse to require more specific answers to such interrogatories.

From the Vanderburgh Circuit Court.

A. P. Hovey, G. V. Menzies and R. A. Hill, for appellants.

A. Iglehart, J. E. Iglehart, S. Vance, C. Denby and D. B. Kumler, for appellees.

MITCHELL, J.—This suit was brought by Robert A. Hill and George W. Shanklin, against Watkins F. Nisbet, Henry F. Blount, Frederick W. Cook, William Heilman, John E. Martin, Samuel Orr, Charles E. Bennett, Daniel J. Mackey, Robert K. Dunkerson, Francis Hopkins, The Evansville Local Trade Railroad Company, The Cincinnati, Rockport and Southwestern Railway Company, and The Evansville and Terre Haute Railroad Company.

It is charged in the complaint with much particularity and detail of circumstance, that the appellants Hill and Shanklin are stockholders in the Evansville Local Trade Railroad Company, and that the other individual defendants are, some of them, officers, directors and stockholders of the two corporations first named, and the others of that last named, and that the Local Trade Company, some time before the commence-

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ment of this suit, purchased two hundred and forty-four thousand dollars of the stock of the Cincinnati, Rockport and Southwestern Railway Company; that some of the appellees, directors of the Local Trade Company, purchased the bonds of the Cincinnati, etc., Co., with the property of the Local Trade Co., but claim to own the bonds individually; that, by threats and intimidation, they have compelled all other stockholders of the Local Trade Co. (except plaintiffs) to surrender their stock in that company to them.

It is charged, also, that some of the appellees, directors of the Local Trade Co., and of the Cincinnati, etc., Co., entered into a combination and conspiracy with others of the appellees, some of whom are interested in the Evansville and Terre Haute Railroad Co., intending fraudulently to give the last named company some unjust advantage over the property of the Local Trade Co.; that the defendants, not corporations, got possession, and made themselves the directors, of the Cincinnati, etc., Co., by voting the stock owned by the Local Trade Co. (which was sixty per cent. of the whole), and that neither of them personally owned any stock, and made such of themselves as were directors of the Evansville and Terre Haute Railroad Co. directors of the Cincinnati, etc., Co., and made the president and the secretary of the Terre Haute Co. the president and the secretary of the Cincinnati, etc., Co., and moved the Cincinnati, etc., Co. into the general offices of the Terre Haute Co.; that it is the design of the defendants, after defrauding all of the other stockholders of the several companies out of their stock, to connect the properties, making one property of great value, to wit, of the value of one million dollars, and then to own the same; that since this suit defendants are seeking to defeat the court in the equitable adjustment between the parties herein, and to that end have subscribed stock in the Local Trade Co., but not *bona fide*; have made assessments upon the stock of the plaintiffs, not *bona fide*, but for the purpose of hindering the plaintiffs in this suit; that the Local Trade Co. is being run in debt to

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the Terre Haute Co. by contracts made by directors of the Terre Haute Co. for the Local Trade Co.; that the defendants have attempted, clandestinely, to consolidate the Local Trade Co. with the Cincinnati, etc., Co., and another, without the knowledge or consent of the stockholders of either of the companies, and have attempted to put a mortgage upon the property for the sum of six hundred thousand dollars, to create a new stock in the sum of eight hundred thousand dollars, and are dividing the bonds and stock so created among themselves as the owners in entirety of these corporations, and are diverting the properties and the proceeds thereof, of the Local Trade and the Cincinnati, etc., Companies, to the payment of interest on the bonds and dividends on the stock so created and divided among themselves; that the defendants have turned over the properties of these companies to the pretended consolidated company, and are now attempting to sell the consolidated company to strangers, and are paying the expenses of this litigation out of the properties of these companies. Wherefore they pray that defendants having any of the bonds be declared trustees; that all sales of such bonds by them be declared void, and that such bonds be cancelled as paid-off indebtedness; that all assignments of Local Trade stock, compelled by threats and intimidation and held by them, be held in trust; that all subscriptions to Local Trade stock that were procured or managed by officers of the Terre Haute Co. be declared void; that the sale of any corporate property by directors to themselves be declared void; that the pretended consolidation and the mortgage afterwards be declared void; that the assets of the companies be marshalled and their debts ascertained; that if the attempted consolidation shall be found legal, the court find who are the stockholders, and the share of each; for a receiver and all other proper relief.

The defences which the appellees set up to defeat the plaintiffs' right to the relief demanded, and which are material to be stated, are pleaded in two affirmative answers. The substance of the first, stated in an abbreviated form, is, that

the \$244,000 of the capital stock of the Cincinnati, Rockport and Southwestern Railway Company was purchased for \$50,000, for which the notes of the Local Trade Railroad Company were given, but as the company had nothing but a paper organization, no money, property or credit, the defendants Nisbet, Heilman, Cook and Blount became the sureties on its notes, and by agreement with its board of directors, the stock purchased was transferred to Heilman, to be held by him as collateral security until the \$50,000 was paid, and the sureties released. After this purchase, the stockholders of the Local Trade Company, including the plaintiffs, refused to allow any assessments to be made on their stock, leaving the company without any ability to meet its notes and relieve its sureties. The sureties, finding themselves in this situation, deemed it best for the Local Trade Company and themselves that they should secure the control of the Cincinnati, etc., Railway Company, with a view of disposing of it and escaping loss, and accordingly they purchased, on their individual account and with their own means, a number of its bonds and other indebtedness and a quantity of its stock. Subsequently, by an arrangement which was approved by the board of directors of the Local Trade Company, the \$244,000 of stock held by it was sold and transferred to Nisbet, Heilman, Cook and Blount, upon the consideration that they would pay the \$50,000 upon which they had become its sureties, and save it harmless from any further liability on that account, and later these gentlemen transferred that, with all the other interests which they had purchased in the Cincinnati, etc., Co., to Charles Bennett and others associated with him. The transfer of the stock to Nisbet and his associates was made to enable them to transfer it to Bennett and his associates in pursuance of a previous agreement.

It is averred, that in all this Nisbet, Heilman, Cook and Blount derived no personal benefit whatever except to be relieved from their obligation to pay the \$50,000, and that the Local Trade Company and its stockholders suffered no in-

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jury whatever, and that it was thereby released from the payment of its obligation which it was wholly unable to meet, and that neither the plaintiffs nor the Local Trade Company ever had or were to have any right or title to the stock sold, except upon the contingency that it should pay the \$50,000 for which it had given its notes; that it never had paid, and was wholly unable to pay, anything on its notes given for the stock, and that the stock sold was of less value than the company realized for it, and that the best interests of the Local Trade Co., required that the sale should be made; that by means of the sale of the stock owned by the Local Trade Co. and the other stock and interests which Nisbet and the other defendants associated with him had acquired in the Cincinnati, etc., Co., to Bennett and his associates, an arrangement was effected whereby a large amount of solvent subscriptions were obtained to the stock of the Local Trade Co., by means of which it was enabled to build and complete a large part of its road in a first-class manner, and that after building a portion of its road, by the consent of all its stockholders, and upon terms mutually agreed upon with the other companies, it was duly consolidated according to the terms of the statute, with two other railway companies, under the name of the Evansville, Rockport and Eastern Railway Company, resulting in securing to the city of Evansville, in whose interest the Local Trade Co. was organized, a well built and well equipped railroad, seventy-two miles in length, all of which it is averred has resulted in great benefit to the stockholders of the Local Trade Co.

The next affirmative answer alleges that the plaintiffs had paid, one of them nothing, and the other substantially nothing on their stock, or on the subscriptions therefor. It also alleges, in particular detail, giving dates, etc., that various assessments, or calls, had been, from time to time, made on all the stock of stockholders of the Local Trade Company, by its board of directors, of which the plaintiffs were duly notified, and that demand of payment had from time to time

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been made on them, and that they had failed and refused to pay the calls, and that on that account its board of directors had by resolution duly entered of record declared the plaintiffs' stock forfeited, and that, by reason of such forfeiture of their stock, they had no right to, or interest in maintaining the action they were prosecuting. The forfeiture was declared pending the suit. Both of these answers were held good on demurrer.

To the second paragraph, which is the first affirmative answer, the plaintiffs set up, in substance, that the consolidation of the several railroad companies, as alleged in the answer, was illegal for want of proper notice, and that it was without authority, and that no record of such consolidation had been made, etc.

To the answer alleging the assessment and forfeiture of their stock, the plaintiffs replied as follows:

"That the said Evansville Local Trade Railroad Company, in making the demand for the said calls mentioned in the said paragraph of said answer, did not state or intimate any intention whatever to forfeit either the payments heretofore made or the stock of the plaintiffs mentioned in said answer, upon the non-payment or in consequence of the non-payment of said calls, and that said plaintiffs have never had any notice of the intention of said board of directors to make said forfeitures, nor have they had notice of any time or place where said board of directors would meet to make said forfeitures."

Both of these replies went out on demurrer, and, refusing to make any further reply, judgment was rendered against the plaintiffs for costs, and from that judgment they bring this appeal.

The questions necessary to a proper determination of the case may all be comprehended under the following statement:

1. Was the purchase of the two hundred and forty-four thousand dollars of the stock of the Cincinnati, Rockport and Southwestern Railway Company, by the Evansville Local

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Trade Railroad Company, *ultra vires*? and, if it was, are the appellees in a situation to assert that fact?

2. If the Evansville Local Trade Railroad Company, by the purchase of the stock in the manner and under the circumstances set out, acquired in it a right, either legal or equitable, was the sale of it by Nisbet and his associates to Bennett and his associates, under the circumstances and on account of their relations to the Local Trade Co., absolutely void, or only voidable? and,

3. If it was voidable only, do the facts presented in the whole record show such equities in favor of the appellants, and such injury to them, as entitle them to a decree of the court avoiding it?

There are several collateral questions more or less involved, but the settlement of the controversy between the parties will depend upon the conclusions which shall be reached upon the questions stated.

The Evansville Local Trade Railroad Company was organized under the general statute of the State for the organization of railroads, with the purpose in view of constructing a railroad from the city of Evansville to some point of connection with, or intersection of, the Cincinnati, Rockport and Southwestern Railway, and from the whole record it may be gathered that it was within the object of the organization to become ultimately consolidated with the latter company. The general purpose being to promote the commercial interests of the city of Evansville, and to create a railroad corporation whose business would prove remunerative to its stockholders.

As, under the statutes of the State, railroad corporations may be organized, and after organization they may acquire by purchase, or consolidate with, other connecting or intersecting lines, it can not be said that the organization of a railroad corporation, with a view of ultimately becoming consolidated, upon equitable terms and in accordance with the provisions of the statute, with one already existing, is against public policy.

At the time of the purchase of the stock in question the Local Trade Railroad Company was in its incipency, not having progressed farther, perhaps, than a paper organization, and the subscription of \$70,750 to its stock.

It does not appear whether its line had been located or not, but if this was done it seems to be granted that no further progress had been made. It seems to be conceded on all hands, too, that the accomplishment of the end had in view by its projectors would be greatly facilitated by the acquisition by it of a controlling interest in the Cincinnati, etc., Co., with the ultimate purpose in view of consolidating the two properties, thereby making one of more value to the stockholders and of more efficiency for public good.

The proposition is stated broadly in many cases, that one corporation can not, without express statutory authority, become the owner of any portion of the stock of another corporation. *Pearce v. Madison, etc., R. R. Co.*, 21 How. 441; *Mutual Savings Bank, etc., Ass'n v. Meridian Agency Co.*, 24 Conn. 159; *Franklin Co. v. Lewiston Savings Bank*, 68 Maine, 43; *Central Railroad Co. v. Collins*, 40 Ga. 582; *Sumner v. Marcy*, 3 Wood. & M. 105; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350 (38 Am. R. 594).

It is said that if this were not so, a banking corporation could become the operator of a railroad, or a railroad corporation might engage in the banking business. It must be said at once, that where the purchase of stock in one corporation by another amounts to engaging in a business other than that authorized by its charter, such purchase is *ultra vires*, and this is so, not because the purchase is stock, but because the business is outside the scope of its charter.

Whether the purchase of stock in one corporation by another is *ultra vires* or not, must depend upon the purpose for which the purchase was made, and whether such purchase was, under all the circumstances, a necessary or reasonable means of carrying out the object for which the corporation was created, or one which under the statute it might accomplish.

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Section 3951, R. S. 1881, authorizes any railroad corporation organized under the provisions of the general railroad law, "to acquire, by purchase or contract, the road, road-bed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect" its line; and if in any case it should appear to be a necessary or reasonable means to that end, no reason is perceived why it might not be accomplished by purchasing the stock, instead of purchasing the corporate property directly. In short, the purchase of stock by one railroad corporation in another will be upheld whenever it is a necessary or reasonable means to the accomplishment of an end proposed, which is within the scope of its statutory powers.

Keeping in view the averments in the complaint, from which the purpose for which the stock was purchased may be fairly inferred, and considering the broad and comprehensive powers, conferred by the statutes on railroad corporations, authorizing them to acquire real and personal property "necessary to accomplish the objects for which the corporation is created," and to acquire the property of, and consolidate with uncompleted connecting and intersecting lines, and we cannot say that the purchase of the stock was unauthorized. R. S. 1881, sections 3903, 3951.

The presumption must be indulged that the purchase of the stock of the Cincinnati, etc., Co. by the Local Trade Co., was a necessary or reasonable means to the accomplishment of the object which the corporation had in view, and that that object was within some one of its statutory powers. *Ryan v. Leavenworth, etc., R. W. Co.*, 21 Kan. 365. The facts in the case cited were that the Leavenworth, Atchison and Northwestern Railway Company was organized to construct a railroad from Leavenworth to Atchison, and the Missouri River Railroad Company owned a railroad running from Leavenworth to Wyandotte. The company first named purchased from the county and city of Leavenworth \$250,000 of the stock of the last named company, with a view of having a con-

tinuous line from Atchison to Wyandotte, and the contention was made there, as here, that the purchase of the stock was *ultra vires*. The learned judge, pronouncing the judgment of the court in that case, after referring to the statutes of the State of Kansas, which are similar to ours, said: "In view of these powers so conferred by law, the act of purchasing said stock by the Leavenworth, Atchison and Northwestern Railroad Company of the county and city of Leavenworth, was not *ultra vires*. While it is not shown by the petition that the purchase of this stock was necessary for the purposes of the corporation, in the absence of any statement to the contrary, we are to presume the company was acting within the terms of its authority and power."

CHURCH, J., in *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475, said: "It has long been an established principle in the law of corporations, that they may exercise all the powers within the fair intent and purpose of their creation. * * * In doing this, they must have a choice of means adapted to ends, and are not to be confined to any one mode of operation."

Aside from the conclusion already reached as to the power of the Local Trade Co. to purchase the stock of the other corporation, there can be little doubt that the appellees who make this question are in no position to insist upon the want of power of the corporation, in which they were at the time a majority of the directors, to make the purchase.

The stock having been actually purchased by the corporation while they were its directors, and it being charged that they have improperly disposed of it, it must be held as to them, however it might have been as to others, that the purchase was valid.

At the time the stock was purchased by or for the corporation, some, if not all, of these appellees were on its board of directors, and while the stock was purchased in its name and for its ultimate benefit, the title to it was very properly transferred to Heilman as an indemnity against loss on account of

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their having become the sureties for the purchase-price. The debt became due, was renewed, and became due again. The corporation had neither money, property nor credit. The stockholders refused to permit assessments to be made on their stock, so as to provide a fund out of which to pay the \$50,000 and interest then due, and the stock purchased was found to be much less valuable than it was supposed to be at the time of the purchase.

At this juncture, Bennett and his associates agreed to purchase the stock provided the legal title in Heilman and the equitable right of the company could be transferred to them, and a contract was accordingly negotiated between Nisbet, for the company on the one hand, and Bennett, for himself and associates on the other.

Bennett and his associates were making the purchase of the stock in the Cincinnati, etc., Co., with a view to a reorganization of the Local Trade Co., which seems to have been abandoned by its friends and existed only in name. Ultimately, they intended to, and did, consolidate the two corporations, built and equipped the road in a substantial manner, and this was their known purpose in making the purchase.

The board of directors of the Local Trade Co., embracing all its stockholders except the plaintiffs, entered of record an order for the transfer of the stock in question to Nisbet, Heilman, Cook and Blount, they agreeing to pay the \$50,000 and interest, which was the full purchase-price, all of which was still owing by the company. This order was made so as to enable Heilman and his associates to carry out the contract negotiated by Nisbet with Bennett and his associates, who agreed, in effect, to pay exactly what the corporation paid, or what was to be paid by Heilman and his associates. Heilman was, at the time of these several transfers, a director in the Local Trade Co., and was also interested with Bennett and his associates in the purchase of the stock, and this fact is relied on to make the transaction void so far as the stockholders of the Local Trade Co. are concerned.

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The demurrer admits that the transfers were made in good faith, that Heilman and his associates had no profit or other advantage from the transactions except to relieve themselves from the burden hanging over their heads, and that in no other way could this have been done.

The argument, in effect, is, that because of the relation in which Heilman and some of those associated with him stood to the corporation and the transactions involved, the purchasers of the stock are trustees for the benefit of the Local Trade Co. and its stockholders, and that they must be held to account as such.

That the directors of a corporation are as to it, and its property and stockholders, trustees, can not be disputed, and that their dealings with the corporate property confided to their care will be subjected to the severest scrutiny when challenged in a court of equity, is a doctrine resting on the highest principles of public policy, and one which has often been recognized by this and other courts, but neither this nor any other court, so far as we are aware, has ever held that a transaction such as this is shown to be, having upon it no impress of unfairness or characteristic of actual fraud, was void.

That the transaction was not void is maintained in the case of *Twin-Lick Oil Co. v. Marbury*, 1 Otto, 587, which in its facts is strikingly analogous, and which in principle conclusively settles the point we are considering.

The case of *Kitchen v. St. Louis, etc., R. W. Co.*, 69 Mo. 224, is an authority directly in point; as is also *Merrick v. Peru Coal Co.*, 61 Ill. 472. In the case of *Kitchen v. St. Louis, etc., R. W. Co.*, *supra*, it was held that although the trustees who made the sale were also members of the association which made the purchase, this fact did not render the sale void, but gave the company the right to redeem, provided the right was exercised within a reasonable time and before the intervention of new equities. See, also, *Bristol Milling, etc., Co. v. Probascio*, 64 Ind. 406; *Ward v. Polk*, 70

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Ind. 309. Such contracts are voidable and not void. *Pratt v. Luther*, 45 Ind. 250; *Port v. Russell*, 36 Ind. 60 (10 Am. R. 5).

The contract of sale here involved was negotiated by Nisbet, on behalf of the corporation, with Bennett, and the principle that an agent or trustee can not contract with himself is thereby avoided, as in the case of *Twin-Lick Oil Co. v. Marbury*, *supra*.

As the contract was not void, it remains to be determined whether upon the facts stated the appellants may avoid it.

It was said in the case of *Piatt v. Smith*, 12 Ohio St. 561: "It is always incumbent upon the party asking the interposition of a court of equity in his behalf, to show a perfect equity. That is to say, the party asking relief in a court of equity must present such a state of facts, as, in equity and good conscience, would, according to the rules of courts of equity, seem to require the granting of relief, to prevent an undue advantage being gained of him by another, or to prevent his suffering an irreparable injury; and that, without being chargeable to his own wrong, or even delinquency." *Howard v. Babcock*, 7 Ohio, 405.

The rule is well established that, unless under peculiar and exceptional circumstances, a court of equity will not intervene to set aside a transaction in itself voidable only, unless it appears that the complainant has sustained or may sustain some damage. Besides, it appears here that new rights have been acquired apparently without protest or objection from the appellants, and as was said in *Samuel v. Holladay*, 1 Woolw. 400, a stockholder in a corporation can not stand by and see an evil done which he claims to be illegal, and then hold the persons responsible who had been involved in it.

In the case of *Busey v. Hooper*, 35 Md. 15 (6 Am. R. 350), certain stockholders asserted that a fraudulent combination had been formed to deprive them of their rights in the corporation. Having paid nothing on their stock, the court held they had no right to ask its intervention.

The appellees who sold the stock having been, by the

refusal of the appellants and other stockholders to permit an assessment, apparently compelled to dispose of the stock, or suffer pecuniary loss, and having obtained for it, so far as appears, its full value, all of which went to the benefit of the corporation to pay its debt, the sale should not be set aside because one of the directors was interested in the purchase.

Assuming that upon the face of the bill a case is presented which entitles the appellants to invoke the interposition of a court of equity for their protection, as existing stockholders at the time it was filed, it may well be questioned whether during the progress of the cause the jurisdiction of the court to administer relief could be arrested by the alleged forfeiture of appellants' stock. But a forfeiture having been declared, and that fact having been set up as an answer, the appellants asked the judgment of the court upon its legality as made.

The contention of the appellants is that the collection of assessments on stock, and forfeiture for non-payment of assessments, are cumulative remedies, and that as it is the primary duty of the directors of a corporation to enforce the collection of assessments, so as to replenish the treasury, a notice that an assessment has been made, and a demand of payment, do not imply, without further notice, that a forfeiture may be declared in the event of non-payment. It is insisted that the defaulting stockholder, in addition to the notice of assessment and demand of payment, is entitled to express notice that non-payment will be followed by forfeiture.

Section 3896, R. S. 1881, governing the subject of assessments and forfeitures of railroad stock, may be conveniently and accurately paraphrased as follows :

"The directors may call in and demand from the stockholders, respectively, any sums of money by them subscribed, in equal instalments of not exceeding ten per cent. per month, under the penalty of forfeiture of the whole of their stock subscribed, with all previous payments thereon, if such stockholders shall not pay any such monthly instalments within thirty days after demand for the payment thereof."

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Under this statute, it has been held that no notice or demand is necessary, except where the forfeiture of the stock is sought to be enforced. *Heaston v. Cincinnati, etc., R. R. Co.*, 16 Ind. 275; *Ohio, etc., R. R. Co. v. Cramer*, 23 Ind. 490; *Smith v. Indiana, etc., R. W. Co.*, 12 Ind. 61. This statute, in effect, became part of the contract between the corporation and the stockholder.

The subscribers to the stock of a railroad must take notice of the acts of the directors as to calls, and when notice is given, or demand made, for the payment of an assessment they may conclude, without more, that a forfeiture may, at the election of the corporation, follow for non-payment of calls legally made.

The case of a forfeiture of the term of a tenant under a lease is in many respects analogous. In such cases, the landlord may elect to sue for rent due without notice or demand, but he may, instead of suing for rent in a proper case, give notice or make demand according to law, and then insist upon a forfeiture. *Meni v. Rathbone*, 21 Ind. 454; *Jenkins v. Jenkins*, 63 Ind. 415, and cases cited.

The statutory requirement must be strictly pursued, but the statute does not require that the demand or notice must be accompanied by a further notice that forfeiture will follow in case of non-payment.

Forfeiture of insurance policies for non-payment of assessments are also analogous in some respects, and it has been held that notice of the assessment is all that is required. *American Ins. Co. v. Henley*, 60 Ind. 515; *Lycoming Fire Ins. Co. v. Rought*, 97 Pa. St. 415.

Whether the consolidation of the several corporations was regularly made or not, was not material.

The appellees had answered a great number of interrogatories filed with the original complaint, which, with the accompanying interrogatories, were superseded by the amended complaint, which was subsequently filed. It was not error

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for the court to refuse to require them to be answered more specifically. We find no error in the record.

Judgment affirmed, with costs.

Filed Feb. 21, 1885.

No. 11,963.

BLOCK v. THE STATE.

CRIMINAL LAW.—*Constitutional Law.*—*Impartial Jury.*—*Causes of Challenge.*

—The question, what is an impartial juror, is largely a judicial question, in view of the Constitution which in a criminal case guarantees to the defendant a trial by an impartial jury, and hence section 1793, R. S. 1881, so far as it enumerates causes of challenge, excluding all others, is not necessarily conclusive upon the courts.

SAME.—*Challenge of Juror.*—*Deputy Prosecuting Attorney not Competent Juror.*—

New Trial.—A deputy of the prosecuting attorney, though not a lawyer, is not a competent juror in a criminal cause, and may be challenged; and if the fact be not discovered until after verdict, a new trial should be granted, though he make oath that he was not influenced thereby.

From the Decatur Circuit Court.

W. A. Cullen, B. L. Smith, C. H. Blackburn, J. K. Ewing and C. Ewing, for appellant.

F. T. Hord, Attorney General, *M. D. Tackett*, Prosecuting Attorney, *J. D. Miller* and *F. E. Gavin*, for the State.

NIBLACK, J.—An indictment was returned in the Rush Circuit Court against Jacob Block and Elsie Block, charging them with having killed Eli Frank, on the 30th day of November, 1883, under circumstances which constituted the homicide murder in the first degree.

A change of venue was taken to the Decatur Circuit Court, where Jacob Block, the appellant here, was tried separately, the trial resulting in a verdict of guilty of murder in the second degree, and a sentence to the State's prison for life.

After the return of the verdict, an ineffectual motion for a

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new trial was made upon the alleged ground, amongst others, that Sanford Grayson, one of the jurors who tried the cause, was an incompetent juror, and that the fact of his incompetency did not come to the knowledge of the appellant until it was too late to avail himself of it at the trial.

The particular objection urged to Grayson's competency was, that at the time of the trial he was deputy prosecuting attorney for one of the townships of Decatur county, under the prosecuting attorney who conducted the prosecution on behalf of the State. To sustain that objection, a copy of his appointment was exhibited as a part of one of the affidavits filed upon the occasion, which was as follows:

"STATE OF INDIANA, DECATUR COUNTY:

"I, Marine D. Tackett, prosecuting attorney of the Eighth Judicial Circuit of Indiana, of which Decatur county forms a part, hereby constitute and appoint Sanford Grayson deputy prosecuting attorney in and for Sand Creek township, in said county, to act for me and in my stead in any and all matters in which the State of Indiana is or may be a party, and to charge and receive all moneys and fees allowed the prosecuting attorney for services by law, the same as if I myself was present.

MARINE D. TACKETT,

"Jan. 11, 1883. Pros. Att'y 8th Judicial Circuit."

It was further shown by affidavit that at the time Grayson was called and sworn, neither the appellant nor his attorneys knew that Grayson held any position under the prosecuting attorney, and that for that reason he was not interrogated as to the relations which he sustained to that officer.

It was admitted that at the time of his service as a juror, Grayson was deputy prosecuting attorney as charged, but, in support of the verdict, he made affidavit that he was not regularly engaged in the practice of the law; that when he was called as a juror, it did not occur to him that his position as deputy prosecuting attorney for a township merely was or might be considered as constituting an objection to his competency, and that hence he did not call attention to the fact

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that he held the position; that his holding the position had no influence whatever upon him in making up the verdict which the jury returned.

The important, and, as we conceive it to be, the controlling, question in this case is, Was Grayson, under the circumstances, a competent juror?

Section 58 of the Bill of Rights, which constitutes a part of our State Constitution, declares that "In all criminal prosecutions the accused shall have the right to a public trial by an impartial jury in the county in which the offence shall have been committed," etc.

Section 1793, R. S. 1881, provides that "The following, and no other, shall be good causes for challenge to any person called as a juror in any criminal trial:"

First. That he was a member of the grand jury that found the indictment.

Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant, but specifying and defining certain exceptions to that general disqualification.

Third. That he entertains conscientious opinions against affixing the death penalty in cases in which it might be inflicted.

Fourth. That he is related within the fifth degree to the injured party.

Fifth. That he has already served as a petit juror in the same cause.

Sixth. That he has served as a juror in a civil case involving the same transaction.

Seventh. That he has been, in good faith, summoned as a witness in the cause.

Eighth. That he is an habitual drunkard.

Ninth. That he is an alien.

Tenth. That he has been called to sit on the jury at his own or some one else's solicitation.

Eleventh. That he is biased, or prejudiced, either for or against the defendant.

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Section 1794 of the same Revised Statutes directs that "All challenges for cause shall be summarily tried by the court on the oath of the party challenged or other evidence, and shall be made before the jury is sworn."

On behalf of the State, it is argued that a juror in a criminal cause can be challenged for no other causes than those specified in the foregoing section 1793, and that under section 1794 no objection can be made to the competency of a juror after he has been sworn, unless his incompetency was concealed in such a way as made the concealment amount to such misconduct on the part of the juror as tended to prevent a fair trial.

A person, to be qualified as a juror, must be a voter of his county, and a freeholder or householder. R. S. 1881, section 1393. It is a felony for a juror, either before or after he is sworn, to accept a bribe, for which he, amongst other penalties, may be disfranchised for a period of time. R. S. 1881, section 2010. It is, also, fairly implied, that one called as a juror is a person of sound mind, of reasonable intelligence, and able to understand the English language. It will not do, therefore, to hold that either party to a criminal prosecution may be compelled to accept any person as a juror who is not a voter of the county, is not either a freeholder or householder, has accepted a bribe in advance, is of unsound mind, is not of reasonable intelligence, or can not understand the English language.

The right of trial by an impartial jury carries with it, by necessary implication, the right to be tried by a capable, as well as a duly qualified, jury. It, consequently, follows that objections, in the nature, at least, of challenges for cause, other than those enumerated in section 1793, *supra*, may be made to the competency of a person called as a juror. This construction appears to us to be inevitable, when the separate parts of our judicial system are considered together as a whole.

On that subject, Thompson & Merriam on Juries, at section 175, say: "Certain causes of challenge enumerated in a statute

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are not exclusive of all others. The grounds of challenge for cause are so various that any attempt to collate them in a statutory provision must necessarily be only partially successful. Causes of a most positive character are liable to arise out of the facts of specific cases, which must result in a failure of justice if the statutory causes only are to be recognized. Such was the rule laid down by the Supreme Court of Alabama, which was afterwards departed from, and still later re-adopted. This rule exists in other States. It results from this consideration: The statutory causes of challenge correspond quite closely to what were termed principal causes of challenge at common law. But we have hitherto seen that a great variety of objections, not less positive in their character, might arise in any case, namely, causes of challenge to the favor, which in the words of Lord Coke were 'infinite.' Although many of the statutes make no reference to the challenge for favor, still it exists as a challenge for cause."

The doctrine thus enunciated really rests upon the theory that the competency of each particular juror has always very much been, and, in the nature of things, must, to some extent, continue to be, a judicial, and hence not exclusively a legislative, question. The courts are charged with the imperative duty of affording every person accused of crime an opportunity of being tried by an impartial jury, and to that end they are required to exercise every judicial power inherent in courts, not abridged or taken away by some valid legislative enactment.

We said in the case of *Stout v. State*, 90 Ind. 1, that "The constitution does not assume to prescribe more than that a juror must be impartial, leaving it to the Legislature and to courts to declare the condition of mind which constitutes impartiality as applied to persons called to serve as jurors."

Where the Legislature, without violating some guaranteed right of the citizen, has assumed to declare who shall be a competent juror with reference to some particular objection

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which might otherwise be urged against him, the declaration of the Legislature is binding upon the courts, but in the absence of any legislative declaration on the subject, the competency of each particular person called as a juror becomes a question for judicial decision.

The "bias" which disqualifies a juror is of two kinds, "actual bias" and "implied bias." *Actual*, where a real bias for or against one of the parties exists. *Implied*, where the relations which the juror sustains to one of the parties are such as to raise a presumption of bias in his favor. *Actual* bias is inferred from the simple use of the word "bias" as a term in legal phraseology, and hence the "bias" declared by section 1793, of the criminal code, to be a cause for challenge to a juror, plainly has reference, primarily, to *actual* bias. *Implied* bias has not, therefore, been made a principal cause for challenge by our statute, but continues to belong to that class of objections to a juror which, at common law, could only be made available by a challenge *to the favor*. *Collier v. Vason*, 12 Ga. 440.

Coke upon Littleton, 156*a*, referring to objections which might be made to a panel of jurors summoned by the sheriff, says, that if either of the parties be subject to the distress of the sheriff, if the sheriff have an action of debt against either one of them, or if either be tenant to the sheriff, the jurors summoned by him would be incompetent.

Chitty on Criminal Law, Vol. 1, 542, in speaking of objections which may be made to a juror on the ground of some actual or presumed partiality, illustrates as follows: "Thus also if the juryman be under the power of either party, or in his employment, or if he is to receive part of a fine upon conviction, or if he has been chosen arbitrator, in case of a personal injury, for one of the parties, or has eaten and drank at his expense, he may be challenged by the other. So if there are actions depending between the juryman and one of the parties, which imply hostility, that will be ground of principal

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challenge, though other actions only warrant challenges to the favor. And, in general, the causes of this nature, which would justify a challenge to the array, on the ground of the presumed partiality of the sheriff, will be sufficient exceptions to an individual juror."

A person sustaining close business relations with either of the parties to an action, is incompetent to sit as a juror in the cause, as, for example, a partner in business with one of the parties. *Stumm v. Hummel*, 39 Iowa, 478. So the clerk of one of the parties to a suit is disqualified from serving as a juror at the trial. *Hubbard v. Rutledge*, 57 Miss. 7. An employee of a railroad company is not a competent juror to try a case in which the company is a party. *Central R. R. Co. v. Mitchell*, 63 Ga. 173. In this case it was said: "It is almost impossible, however incorruptible one may be, not to bend before the weight of interest; and the power of employer over employee is that of him who clothes and feeds over him who is fed and clothed. Hence the common law excluded all servants, and our statutes have nowhere altered the rule, and it should not be altered. A close relative is a less dangerous juror, if not a dependent kinsman, than one who is dependent on his employer." Coke upon Litt. 156a; Thomp. & Merriam Juries, section 185.

The criminal code of New York adopted in 1881, in section 377, which declares what conditions, or relative conditions, raise the presumption of "implied bias," enumerates, amongst others, the following: Bearing to one of the parties the relation of guardian or ward, attorney or client, or being client of the attorney or counsel for the people (the State), or the defendant, or master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offence charged, or on whose complaint the prosecution was instituted, or in his employment on wages. The entire section is, in the main, nothing more than a re-assertion, in a new form, of the prin-

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ciples and definitions of the common law on the subject of "implied bias," which have always been either expressly or inferentially recognized in this State.

The prosecuting attorney stood, in this case, for and as the representative of the State, and was, by analogy and for all practical purposes, the plaintiff in the prosecution. Grayson, by his appointment as deputy, had become and was the employee and subordinate of the prosecuting attorney, as well as the attorney for the State within certain territorial limits. He was, therefore, *impliedly* biased against the appellant, and hence an improper juror.

It is true, as contended by counsel for the State, that when a juror is called in a criminal cause, the accused is required to use due diligence to ascertain whether he possesses all the usual and most notable qualifications as a juror. *Rice v. State*, 16 Ind. 298; *Hudspeth v. Herston*, 64 Ind. 133; *Lamphier v. State*, 70 Ind. 317; *Adams v. State*, 99 Ind. 244; Wharton Crim. Pl. and Pr., section 845; Thompson & Merriam, above cited, sections 298, 302, 303, 339, 428.

In the absence, however, of something to suggest a more extended inquiry, it is doubtless not to be expected that the accused shall, in any event, be required to ask questions not involved in some one of the principal causes for challenge. *Williams v. State*, 3 Ga. 453.

As has been shown, the objection to Grayson's competency was not primarily included in any of the principal causes for challenge known to our statutes. It was too remote to have been anticipated by inquiries from any source. Both the prosecuting attorney and Grayson ought to have made known the relation which existed between them. It is claimed that their failure to do so was an inadvertence merely, and there is good reason for believing that it was such only, but the appellant was presumably none the less injured by their failure. It may be that the objection to Grayson's want of qualification to sit as a juror in this case worked no actual injury to the appellant, but, however that may have been,

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we can not afford to make the precedent which would be established by our holding that Grayson was a competent juror.

The judgment is reversed, and the cause remanded for a new trial. The clerk will give the necessary notice for a return of the prisoner to the custody of the sheriff of Decatur county.

Filed Feb. 25, 1885.

 No. 12,160.

SHAFFER v. THE STATE.

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CRIMINAL LAW.—*Plea of Guilty.*—*Suspension of Sentence.*—*Subsequent Arrest.*—*Motion for Discharge.*—*Error.*—Where an adult defendant, charged by indictment with felony, enters a plea of guilty, and an order-book entry in the cause, after showing the finding of the court as to the amount and character of his punishment, concludes thus: "And the court now suspends the sentence herein, and cause continued for *alias* process," upon his subsequent arrest, there is no error in overruling a motion for his discharge, based upon the assumption that such order-book entry was the final judgment of the court in the cause.

SAME.—*False Pretences.*—*Question of Fact.*—*Indictment.*—Where the indictment charges the defendant with having obtained money by certain false pretences, whether or not the alleged false pretences are such as would deceive, is a question of fact, and not of law.

From the Wabash Circuit Court.

B. M. Cobb, for appellant.

F. T. Hord, Attorney General, *C. R. Pence*, Prosecuting Attorney, and *W. B. Hord*, for the State.

Howk, J.—On the 24th day of October, 1881, an indictment was duly returned into the Huntington Circuit Court, charging, in substance, that the appellant, on the 14th day of February, 1881, at the county of Huntington, by means of certain alleged false pretences, stated in detail, falsely and fraudulently obtained and procured of and from one Cyrus E. Bryant the sum of thirty dollars in money, etc. Thereafter, at the same term of the court, upon the appellant's applica-

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tion, the venue of the cause was changed to the Wabash Circuit Court. Afterwards, on the 25th day of September, 1882, the appellant appeared in person and by counsel, and, having waived an arraignment, for his plea to the indictment, said that he was guilty as therein charged. The transcript then contains an order-book entry in the case as follows: "Therefore the court finds and assesses his fine unto the State of Indiana in the sum of ten dollars, and that he be imprisoned in the penitentiary for the term of time of two years. And the court now suspends the sentence herein, and cause continued for *alias* process."

The cause was then continued from term to term, without any further action therein, until the September term, 1884, of the court below. The transcript then shows, under date of September 22d, 1884, the court then ordered a bench-warrant to be issued for the appellant, which was done; that the appellant then appeared in person and by counsel, and it was agreed in open court that he was twenty-one years of age when he entered his plea of guilty herein, on September 25th, 1882. Thereupon appellant moved the court in writing for his discharge, which motion was overruled, and he excepted. His motions for a new trial and in arrest of judgment were severally overruled by the court, and exceptions were duly saved to each of these rulings. The court then pronounced judgment and sentence against the appellant, upon and in accordance with its finding, made almost two years before that time, to wit, on September 25th, 1882, and charged the sheriff of Wabash county with the execution of such sentence, to all of which appellant at the time excepted.

Several errors are assigned by the appellant upon the record of this cause, but of these only two are discussed here by his counsel, namely: 1. The overruling of appellant's motion for his discharge; and, 2. The overruling of his motion in arrest of judgment. These two errors we will consider in the order of their statement, and the other assigned errors will be regarded as waived.

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1. Appellant's motion for his discharge was in writing, and the reason assigned therein for his discharge was that the order-book entry in the case, of the date of September 25th, 1882, heretofore copied in this opinion, was in fact the judgment of the court against him, by which he was still content to abide, and that such judgment was in full force, unreversed and unappealed from; wherefore he said that the court had no authority to alter, amend or change such judgment. The entire argument of appellant's counsel, in discussing the error under consideration, proceeds upon the ground stated in the motion, that the order-book entry referred to was in fact the judgment of the court in this cause, and that the proceedings of the court thereafter had, on September 22d, 1884, were erroneous and could not be sustained, solely for the reason that they were an attempted alteration, amendment or change of such judgment, after the term at which it was rendered. We fail to see how such order-book entry can possibly be considered as the judgment in the cause, when, upon its face, it is merely the finding of the court of the amount and character of appellant's punishment, and when, by its terms, it expressly suspended the entry of judgment. We are of opinion, therefore, that the court did not err in overruling appellant's motion for his discharge, for the reason or upon the ground assigned in such motion.

In section 1767, R. S. 1881, it is provided as follows: "If the accused plead guilty, such plea shall be entered on the minutes, and he shall be sentenced, or he may be placed in the custody of the sheriff until sentence. And if an accused be under the age of twenty-one years, the court may, in its discretion, withhold sentence and order that the accused be released during good behavior; and the court shall have full power to order his or her re-arrest, and to pronounce sentence whenever the conduct of the accused shall, in the opinion of the court, make such action proper." In *Smith v. Hess*, 91 Ind. 424, in construing this section of the statute, it was said: "The legitimate inference from the statute is

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that the Legislature, in its enactment, did not intend that the courts should allow adult offenders to go on good behavior. Without deciding what might be the result of such a practice, upon a proper case made, and properly brought before us, we may say that, as at present advised, we do not feel like giving our sanction to that practice." We adhere to these views, but we do not find it necessary to decide the question in the case in hand. For, although it was agreed below that the appellant was twenty-one years of age, at the time he entered his plea of guilty, yet the record wholly fails to show that the court ordered that he be released during good behavior. The reasons which induced the court's suspension of judgment against the appellant are not shown in the record, but it may be fairly inferred therefrom that he had escaped from custody, and was not present when judgment ought to have been pronounced against him. In such a case, of course, judgment was necessarily delayed until he could be, as he was, arrested and brought into court.

2. The court did not err, we think, in overruling appellant's motion in arrest of judgment. The indictment was sufficient. The offence charged was alleged to have been committed on the 14th day of February, 1881, at which time section 27 of the felony act of June 10th, 1852, was still in force and made it a felony to obtain money or property by, *inter alia*, "any false pretence." Before the return of the indictment in this case, section 2204, R. S. 1881, took effect, superseded and repealed by implication so much of the previous law as made it a felony to obtain money or property by "any false pretence." *Wagoner v. State*, 90 Ind. 504, and cases there cited. But in section 2216, R. S. 1881, it is expressly provided that the repeal of prior and existing laws "shall not affect any prosecutions pending or offences heretofore committed under existing laws; and such prosecutions and offences shall be continued and prosecuted to a final determination," as if the later law had not been passed. The question whether or not the false pretences, stated in the in-

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dictment, were such as were calculated to deceive, was a question of fact for the jury, and not of law for the court. *Miller v. State*, 79 Ind. 198.

We find no error in the record.

The judgment is affirmed, with costs.

Filed Feb. 25, 1885.

No. 12,021.

HUMPHRIES, ADMINISTRATOR, v. DAVIS.

DESCENT.—*Adoptive Child.*—*Adoptive Parents.*—Where a child is adopted by a husband and his wife jointly, and dies, without children or their descendants, the owner of land inherited from the adoptive mother, the surviving husband and adoptive father will take such land in preference to the natural mother.

DECEDENTS' ESTATES.—*Heir.*—*Administrator.*—*Rents of Land.*—Rents which accrue prior to the death of the intestate belong to the administrator, and form part of the assets of the decedent's estate, but unless land is required for the payment of debts, such rents go to the heir together with the rents which accrue subsequent to the death of the ancestor.

TENANTS IN COMMON.—*Rents.*—*Right of Tenant to Recover from Co-Tenant.*—One tenant in common who occupies the land is not accountable for rent unless he excludes his co-tenant, but is accountable where he receives the rent from a third person.

SAME.—*Right of Administrator to Recover Personal Property.*—E. D. was the adoptive daughter of I. D. and J. D., his wife; the latter died, and subsequently the adoptive daughter died; the adoptive father took possession of the personal property left by his wife, and the administrator of the adoptive daughter's estate sued to recover the property, but did not show that there was not an administration on the estate of J. D., nor that she did not owe debts.

Held, that the action can not be maintained.

From the Montgomery Circuit Court.

G. W. Paul and J. E. Humphries, for appellant.

E. C. Snyder, P. S. Kennedy and S. C. Kennedy, for appellee.

ELLIOTT, J.—The complaint in this case alleges that the
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128	209
100	369
132	300

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164	98

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appellant is the administrator of Emily Davis, deceased; that Emily Davis was the adopted child of the appellee Isaac Davis and his wife, Jessie Davis; that Mrs. Jessie Davis died before her adopted daughter; that the appellee took possession of land inherited by the adoptive daughter from her adoptive mother, and has appropriated to his own use the rents and profits thereof, and that he has also taken possession of and converted personal property of which Emily Davis died the owner.

There are two branches of this case. The first relates to the real estate; the second concerns the personal property.

We shall first dispose of that branch which involves the right to the rents and profits of the real estate, and this we do without amplification by stating four settled rules of law:

First. An adoptive father inherits from a deceased adoptive child land which the child inherited from its adoptive mother in preference to the natural mother, and the inheritance vests in the adoptive father the rights of an heir, with all their legal incidents. *Humphries v. Davis*, ante, p. 274; *Davis v. Krug*, 95 Ind. 1; *Krug v. Davis*, 87 Ind. 590.

Second. An heir has a right to land to the exclusion of the administrator, unless it is required for the payment of debts. *Newcomer v. Wallace*, 30 Ind. 216; *Smith v. Dodds*, 35 Ind. 452, see p. 454.

Third. Rents which accrued prior to the death of the decedent belong to the personal representative, but it is necessary to show that rents did accrue, in order to entitle the administrator to sue for them; it is not enough to show mere continued occupancy, by one of the heirs.

Fourth. One tenant in common is not bound to pay rent while he remains in possession unless he excludes his co-tenant, but if he receives rent from another, he must account for it. *Crane v. Waggoner*, 27 Ind. 52; *Jenkins v. Dalton*, 27 Ind. 78; *House v. House*, 29 Minn. 252; *Henderson v. Eason*, 17 Ad. & Ell. N. S. 701, 718; *Sargent v. Parsons*, 12 Mass. 153;

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Woolever v. Knapp, 18 Barb. 265; *Ragan v. McCoy*, 29 Mo. 356; *Pico v. Columbet*, 12 Cal. 419.

The branch of the case which involves the right to recover the personal property converted by the appellant presents some questions essentially different from those we have considered and decided. It is the general rule, that an administrator may maintain an action against the person who has wrongfully converted the personal property of his intestate. *Smith v. Dodds*, *supra*; *Burnham v. Lasselle*, 35 Ind. 425. If the case made is within the general rule, the judgment must be reversed; the contention, however, is not as to the existence of the general rule, but as to whether the case is within its operation.

It is settled by the decisions of this court that an heir can not maintain an action to recover a claim due the estate of the intestate unless it appears that there were no debts due from the estate, and no necessity for an administration in due course of law. *Williams v. Riley*, 88 Ind. 290; *Begien v. Freeman*, 75 Ind. 398; *Westerfield v. Spencer*, 61 Ind. 339; *Moore v. Board, etc.*, 59 Ind. 516; *Ferguson v. Barnes*, 58 Ind. 169; *Schneider v. Piessner*, 54 Ind. 524. It is clear, under the law laid down in the cases cited, that Emily Davis could not have maintained an action against the appellee without averring that there were no debts or no administration, and her personal representative can have no greater rights than the deceased person whom he represents possessed during her life. It results, therefore, that the administrator, as the personal representative, can not maintain this action without averring that there were no debts of the deceased mother.

In the case of *Schneider v. Piessner*, *supra*, the court held that there might be cases in which the heir could sue, and cited *Martin v. Reed*, 30 Ind. 218; *Walpole v. Bishop*, 31 Ind. 156; *Bearss v. Montgomery*, 46 Ind. 544. The opinion of the court was delivered by WORDEN, C. J., who said: "But in our opinion, where the heirs of the creditor sue for

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the debt, the complaint should aver every fact necessary to give them a right of action and to recover the money. It is not sufficient to show that there are no debts to be paid. The complaint must show by its averments that the heirs suing are entitled to the money." The court, in another case, repeated in substance this statement of the law. *Williams v. Riley, supra*, see page 294. If this is necessary in an ordinary case, it certainly must be so in such a case as this. Here the personal and real property were both in the possession of the heir rightfully entitled to it, and the administrator should not be allowed to take it from him unless needed for some lawful purpose. If it was not needed for some legitimate purpose, the administrator ought not to take it from the lawful heir. It would ultimately vest in the heir, and his rights and possession should not be disturbed. It is clear that if some third person had secured the property, and there were no debts, the heir would have been awarded it in due course of law, and now, that he has it, it should not be taken from him without showing a full and clear right. There would be little good accomplished by going through the course of administration and at the end put the property back in the hands of the heir less the expense of a useless and vexatious administration. At all events, a clear case must be shown, and, in order to show such a case, it is necessary to aver, among other things, that the mother's estate was not administered upon. It can not be presumed in favor of such an action as this that the estate of the deceased mother was not duly administered.

An administrator does not take the property of the intestate for his own benefit or in his own right; he takes it as trustee for the creditors and heirs. If it is not needed to pay creditors, then it belongs to the heirs, and the administrator represents them. Ultimately, the beneficial interest is in the heirs, and, indeed, is in them from the first, burdened only with the debts of the intestate. Here there is no such burden, and no reason exists for taking the property from

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the heir. It has been often held that if the heirs satisfy the claims of the creditors, they may take and hold the property. *Coldron v. Rhode*, 7 Ind. 151; *Hibbard v. Kent*, 15 N. H. 516; *Harris v. Seals*, 29 Ga. 585; *Henderson v. Clarke*, 27 Miss. 436; *Hargroves v. Thompson*, 31 Miss. 211. In the case of *Walworth v. Abel*, 52 Pa. St. 370, it was said that "The mere legal estate passes to the administrator, the equitable descends upon the parties entitled to distribution. If there be no creditors the heirs have a complete equity in the property, and if they choose, instead of taking letters of administration, to distribute it by arrangement made and executed amongst themselves, where is the principle which forbids it?" In speaking of one who had taken out letters under a state of facts very like those under which the appellant secured his, the court caustically and forcibly said: "We do not know whether this was a case of mere intermeddling or not by the plaintiff below, but it looks like it. He was a stranger to the decedent and the heirs, we are told; and although his letters of administration are valid until revoked, certainly he was not a party whom the law regards as entitled in the first instance to administration. If those entitled first to administration, the widow and heirs in succession, preferred a settlement of their own affairs without going into the orphan's court, and could do it without interfering with the rights of others, the law did not forbid it, and a stranger might well have afforded to forbear interference." We may, upon the same principle, say here, that as there were no creditors, and the property was in the hands of the heir to whom it must ultimately go, the appellant might well have forborne interfering.

Judgment affirmed.

Filed Feb. 10, 1885.

Elson v. Spraker.

No. 12,039.

ELSON v. SPRAKER.

GUARDIAN AND WARD.—*Personal Liability of Guardian.*—*Taxes.*—*County Treasurer.*—*Contract.*—*Statute of Frauds.*—A guardian, E., whose ward's land was advertised for sale for taxes, requested S., the treasurer, to receipt such taxes as paid and hold the receipt for a short time, when he would get money from a sale of the land and pay the same. S. thereupon did as requested, and in his settlement with the auditor accounted for such taxes as paid. E. sold the land and settled with his ward without paying S.

Held, that E.'s promise is not within the statute of frauds, and that he is personally liable to S. for the amount of such taxes.

From the Howard Circuit Court.

N. R. Lindsay, J. W. Kern and B. F. Harness, for appellant.
J. C. Blacklidge, W. E. Blacklidge and B. C. H. Moon, for appellee.

BEST, C.—This action was brought by the appellee to recover the sum of \$53.56 paid by him, as is alleged, at the appellant's request, upon taxes due and delinquent upon the land of his ward.

Issue, trial, finding and judgment for the appellee. Motion for a new trial, on the ground that the finding was not sustained by the evidence, was overruled, and this ruling is assigned as error.

The evidence is in the record, and it shows that the appellee was treasurer of Howard county; that on the 12th day of February, 1881, there was due and delinquent upon the land of Belle Foster, the appellant's ward, taxes amounting to \$53.56; that at that time the land was advertised for sale for said taxes, and the appellant, who was then negotiating a sale of the land, called upon the appellee and requested him to receipt the taxes as paid, and hold the receipt for a short time, saying that he expected the money within a few days from a sale of the land, and that he would then pay the taxes;

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that the treasurer thereupon receipted the taxes as paid, held the receipt as requested, and accounted for these taxes as paid in his settlement with the county auditor; that the appellant sold the land, obtained the money, settled with his ward, and was discharged without paying the appellee.

These facts rendered the appellant clearly liable for the amount of these taxes. The arrangement made was equivalent to the advancement of so much money by the appellee to the appellant at his request, and this rendered him personally liable to repay the money thus advanced.

The fact that he was guardian, and the taxes were his ward's, are of no consequence, as the payment was made at his request and upon his promise to repay the money. In such case a guardian is personally liable. *Clark v. Casler*, 1 Ind. 244; *Stevenson v. Bruce*, 10 Ind. 397; *Lewis v. Edwards*, 44 Ind. 333.

The promise of appellant was not a promise to pay the debt of another, as is suggested, but was a promise to pay money advanced at his own request, and was, therefore, a promise to pay his own debt. Such promise is not within the statute of frauds. *Palmer v. Blain*, 55 Ind. 11.

The statutes which authorize a county treasurer to collect taxes for which he has by mistake accounted have no application to a case of this kind, and, therefore, they need not be more particularly noticed.

The motion for a new trial was properly overruled, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs, with ten per cent. damages.

Filed Feb. 25, 1885.

Dippel *et al.* v. Schicketanz, Administrator.

No. 11,748.

DIPPEL ET AL. v. SCHICKETANZ, ADMINISTRATOR.

JUDGMENT.—*Review of.*—*New Matter.*—*Mistake of Law.*—*Partition.*—Where an attorney, acting as such, innocently advises his client, an administrator, erroneously as to his rights in a matter in which the attorney has an adverse interest, whereby the client and attorneys employed by him are misled, and take a judgment in partition for a share of real estate, to the advantage of the first attorney, the whole of which was owned by the intestate, the discovery of the truth afterwards is material new matter, not discoverable by reasonable diligence, justifying a review under section 617, R. S. 1881, as against the first attorney.

From the Marion Circuit Court.

W. D. Bynum and *A. T. Beck*, for appellants.

J. E. Florea and *A. W. Wishard*, for appellee.

COLERICK, C.—This action was brought by the appellee to review a judgment. It appears by the averments in the complaint, that on the 25th day of August, 1865, one Christian F. Schmidt, then the owner of lots numbered 39 and 40, in John Rossett's subdivision of parts of out-lots numbered 107 and 108, in the city of Indianapolis, sold and conveyed the same to Lebrecht Dippel and Catharine Dippel, his wife, by a deed of conveyance, in which the wife of Schmidt joined. By the conveyance, so executed, the grantees became the owners, as tenants by entireties, of the property conveyed. Afterwards Lebrecht died testate, and by the provisions of his will, which was duly probated, he assumed to devise said real estate, with other parcels owned by him, to his wife and children. Subsequently Catharine died, and after her death the appellee, as the administrator of her estate, instituted an action for the partition of the real estate of which Lebrecht died seized, in which was included the property now in dispute, which it was then supposed by all the parties to the action was owned by Lebrecht at the time of his death, and the heirs of Lebrecht and Catharine were made parties thereto, as well as the appellant Will. F. A.

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Bernhamer personally, and as guardian of the minor heirs of F. Miller, deceased. The partition was asked to enable said administrator to subject the interest of Catharine in the property to sale for the payment of the debts of her estate. It was averred in the complaint in that action that her interest in the two lots above described was the one undivided third part thereof. This averment was made upon the erroneous assumption that the only interest which she held therein was acquired by her as the widow of Lebrecht. The appellant Bernhamer personally, and as such guardian, was made a party to the action because he personally held a judgment against one of the heirs of Lebrecht, which was a lien upon the interest of said heir in the real estate of which Lebrecht died seized, and held, as such guardian, a mortgage upon the interest of one of said heirs in said real estate. The action, so commenced, was tried and determined by the court, and resulted in the making of an order by the court, appointing a commissioner to sell the property now in dispute, which was found to be indivisible. It was therein adjudged that the interest of Catharine in the property was the one-third thereof, as the widow of Lebrecht. Afterwards the property was sold by the commissioner appointed for that purpose, but, before the completion of its sale, it was discovered that Lebrecht's interest in the property had terminated by his death, and that by reason of his death Catharine had become the sole owner of the property, and was such owner at the time of her death. This discovery when made was at once reported to the court by the commissioner, and thereupon he was ordered by the court to take no further proceedings in the sale of the property. Within ten days afterwards this action was commenced by the appellee to review and vacate the judgment so rendered, by reason of said mistake. All the parties defendants to the former action were made defendants thereto, and they, except the appellant Bernhamer, consented to the review and vacation of the judgment as prayed for. A complete record of the proceedings in the

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former action was set out in the complaint, which was properly verified. Separate demurrers were filed to the complaint by the appellant Bernhamer, personally and as such guardian, which were overruled by the court, to which rulings he excepted, and, refusing to answer over, final judgment on demurrer was rendered against him, from which he appeals to this court, the other defendants in the action refusing to join in the appeal. The only error assigned that has been discussed by him in his brief assails the sufficiency of the complaint. The averments assailed are as follows:

“The plaintiff alleges and avers that at the time of the death of said Lebrecht Dippel said lots 39 and 40, heretofore described, were held by said Lebrecht Dippel and Catharine Dippel, his wife, by entirety, and that at the death of said Lebrecht, her husband, said Catharine Dippel became the owner entire of said real estate, and that she so held the same until her death. Said plaintiff further says he caused a careful investigation of the records to be made before bringing said action for the partition of said real estate and for the sale of the interest of said Catharine Dippel, deceased, therein, and that he thought and believed her to be the owner of but one-third thereof, and that his attorneys, in examining said records on his behalf, found that by his last will and testament Lebrecht Dippel, the deceased husband of said Catharine, claimed to own the whole thereof, and that said Catharine, as widow, had but one-third thereof, and that he and his attorneys were misled thereby. He further says that he was deceived therein by the defendant Bernhamer, who was his attorney prior to the bringing of said action for partition, and that said Bernhamer told and stated to plaintiff as his attorney, that said Catharine had only one-third thereof, and that plaintiff and his present attorneys, Florea and Wishard, were misled and deceived by the statements of the defendant Bernhamer, and that he has learned and discovered since said real estate was offered for sale by said commissioner, that said Catharine held the whole thereof.”

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The statute provides, "When the complaint for a review is filed for new matter discovered since the rendition of the judgment, it shall be verified by the complainant, and show that the new matter could not have been discovered before judgment by reasonable diligence, and that the complaint is filed without delay after the discovery." R. S. 1881, section 617. In this case the complaint was verified as required by the statute, and was filed without delay after the new matter therein recited was discovered, which discovery was made after the rendition of the judgment so reviewed and vacated.

By reason of the peculiar circumstances of this case, as disclosed by the complaint, we think that it sufficiently appears that the new matter therein mentioned could not, by reasonable diligence, have been discovered before the rendition of the judgment so reviewed, and that the appellee, who was merely acting in a fiduciary capacity, exercised, under the circumstances, reasonable diligence before the rendition of said judgment in ascertaining the nature and extent of the interest which Catharine Dippel held in the property in controversy at the time of her death. It would have been wrong and unjust to the creditors and heirs of the decedent for the court to have refused, under the circumstances, the relief that was granted, as the judgment vacated was, doubtless, rendered by the court under a misapprehension, in which all the parties indulged, as to the nature and extent of Catharine Dippel's interest in the property, and the mistake under which the appellee so labored was induced, to some extent, by the appellant Bernhamer. We can not disturb the judgment of the court below, as it was clearly right on the merits of the case.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellants.

Filed Jan. 23, 1885. Petition for a rehearing overruled April 23, 1885.

Meranda v. Spurlin et al.

No. 11,870.

MERANDA v. SPURLIN ET AL.

DRAINS.—Remonstrance.—Report of Commissioners.—In a remonstrance to the report of the drainage commissioners, under the act, R. S. 1881, section 4273, *et seq.*, as amended, Acts 1883, p. 173, it is not sufficient to state that the report is not according to law. The particulars in which it is claimed the report is not according to law must be stated.

SAME.—Cause of Remonstrance.—Uncertainty.—A cause of remonstrance, that the report of the commissioners does not show with sufficient certainty the method of drainage, is too uncertain.

SAME.—Conclusiveness of Report of Commissioners.—As to whether or not the method of drainage adopted is the cheapest and most practicable, are questions for the judgment of the commissioners, and in the absence of fraud, their judgment thereon can not be reviewed.

SAME.—Presumption.—The decision of the commissioners upon these questions need not be embodied in their report. From the location of the drain by the commissioners it will be presumed that they passed upon these questions.

SAME.—Report as to Location of Drain.—As to the location of the drain, the courses and distances are all that need be stated in the report of the commissioners.

SAME.—Sufficiency of Report.—A report of the commissioners in substantial compliance with the form prescribed by the statute is sufficient.

SAME.—Amendment.—The court may allow the commissioners to amend their report after it has been filed.

SAME.—Evidence.—The evidence in support of the remonstrance will be confined to the issues tendered by it.

SAME.—Witnesses' Opinions.—The opinions of witnesses, that the drain will be of public utility, benefit any highway, or benefit or damage any particular lands, are not competent evidence.

SAME.—Available Error.—A party who first introduced such evidence upon such questions can not successfully ask a reversal of the judgment because the other side is allowed to meet it with like evidence upon the same questions.

SAME.—Evidence.—Motion for New Trial.—Questions as to the sufficiency of the evidence, and the admission and exclusion of testimony, in a proceeding to establish a drain, are properly presented by a motion for a new trial.

SAME.—Public Utility, Proof of.—The question of public utility is not to be split up, and the drain defeated, by showing that it will not be of public utility in one of the counties into which it extends. The question of public utility has reference to the drain as a whole, without regard to the county lines that may cross it.

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SAME.—Drains Extending into More than one County.—Authority to Establish.—

The circuit court in which the petitioner resides, and in which the proceeding is commenced, has authority to establish a drain extending into another county.

SAME.—Establishing Such Drain upon Line of Drain Formerly Established by Board of County Commissioners.—Such drain, under the above acts, may be established and constructed along and upon a drain formerly constructed by the order and judgment of the board of county commissioners.

SAME.—Proof of Notice.—Nunc Pro Tunc Entry.—From the affidavits on file in proof of posting the notices, and the court's notes, "proof of notice filed, cause ordered docketed," a *nunc pro tunc* entry may be made at a subsequent term showing that the notices were posted, as stated in the affidavits.

SAME.—Notice of Entry.—A party, having appeared to a motion for a *nunc pro tunc* entry, can not afterwards object that notice of such motion was not served upon others, against whom benefits are assessed.

SAME.—Sufficient Proof of Notice.—Under the amended act, Acts 1883, p. 174, proof of the posting of notices need not necessarily be by affidavit.

From the Tipton Circuit Court.

M. Garrigus, for appellant.

R. B. Beauchamp, for appellees.

ZOLLARS, C. J.—This is a proceeding commenced in the Tipton Circuit Court, under the act of 1881, R. S. 1881, section 4273, *et seq.*, as amended in 1883, Acts 1883, p. 173, to establish a drain, partly in Tipton and partly in Howard county.

Appellant was a remonstrant below, and has appealed from the judgment establishing the drain. We notice the objections to the proceedings below in the order discussed by his counsel.

The substance of the fourth cause of remonstrance, to which a demurrer was sustained, is, that the report of the commissioners is not according to law, for the reason that the portion of the proposed drain in Howard county, as located in the report, is along and upon a drain established and constructed pursuant to an order and judgment of the board of commissioners of Howard county, under the act of March 9th, 1875 (1 R. S. 1876, p. 428). The condition that this drain

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was in at the time these proceedings were commenced and consummated in the court below, is not stated in this cause of remonstrance. So far as we can know from this cause, that drain, on account of neglect or insufficiency, may have been abandoned as useless. This court has recently held that it is not sufficient in a remonstrance to use the general terms of the statute, that "the report of the commissioners is not according to law;" that the particulars in which it is not according to law should be stated; and, further, that the evidence on the part of the remonstrant will be confined to the issues tendered by his remonstrance. *Higbee v. Peed*, 98 Ind. 421; *Anderson v. Baker*, 98 Ind. 587. It follows from these cases that in determining the sufficiency of any particular cause of remonstrance we must look alone to the specific facts therein stated. This disposes of appellant's argument upon the demurrer to the fourth cause of remonstrance, that the report of the commissioners does not show with sufficient certainty "the method of drainage," etc.

This cause of remonstrance raises no such question. As to whether or not the method of drainage adopted is the cheapest and most practicable, it has been held, are questions for the judgment of the commissioners, and that, in the absence of fraud, their judgment upon these questions can not be reviewed; that their decision upon these questions need not be embodied in their report; and that, from their location of the drain, it will be presumed that they first determined these questions. *Anderson v. Baker, supra*.

If the fourth cause of remonstrance properly presents any questions, they are: *First*. As to the power and jurisdiction of the Tipton Circuit Court to establish the drain, a portion of which is in Howard county; and, *Second*. As to the authority to establish the drain along and upon the drain formerly established by the board of commissioners of that county. The first question has been decided adversely to appellant's contention, and it has been held that the court of the county in which the petitioner resides and the proceeding is commenced,

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has jurisdiction and authority to establish a ditch extending into another county. *Shaw v. State, etc.*, 97 Ind. 23; *State, etc.*, v. *Turvey*, 99 Ind. 599; *Crist v. State, ex rel.*, 97 Ind. 389.

We know of no constitutional or statutory inhibition against locating and constructing one of these drains along and upon a drain formerly constructed pursuant to an order and judgment of the board of commissioners. These latter drains are constructed by the public for public purposes, and while the land-owners are assessed according to benefits derived, they do not thereby acquire vested rights that will prevent the location and construction of another drain upon the same line. The power is analogous to the power of cities to reconstruct streets, except in the latter case the statute provides that the damages caused by the improvement shall first be paid to the land-owner who was assessed for a former improvement. *City of Kokomo v. Mahan, ante*, p. 242. To hold the contrary would be to greatly embarrass and cripple the public authorities and individuals in the proper drainage of wet lands. The location and construction of such second drain is not a question of power, but rather one of policy. When a drain is thus located and constructed under an order of the board of commissioners, and the property-owners have been assessed for benefits, it would seem that some sufficient reason should exist for the construction of another drain upon the same line by the order and judgment of the circuit court. It might become a question of public utility as to the second drain; if so, that question could be tried under the eighth cause of remonstrance, as provided by the statute (Acts 1883, p. 177); and so it might become a question as to whether or not the land-owners will be benefited by, or should be assessed for, the construction of the second drain. If so, these questions could be tried under the fifth statutory cause of remonstrance. Acts 1883, p. 177. These questions of public utility, etc., and benefits, are questions of fact to be decided upon the evidence, and are not properly raised by any specific statements in the cause of remonstrance under examination. This cause,

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as filed, does not seek to raise these specific questions; they are raised by other causes of remonstrance, which we shall have occasion to notice hereafter.

An argument is made under the fourth cause of remonstrance, as filed, that as the drain crosses a railroad in Howard county, and as no notice was given to the railroad company, so far as its track in Howard county is concerned, the court below did not have jurisdiction, and its proceedings were without authority and void.

No such question is raised by this cause of remonstrance; it does not inform us of the fact of such crossing; nor is that fact developed by the petition, the notice, or the report of the commissioners. A plat attached to appellant's brief shows such a crossing, but we are confined to what is shown by the record, and can not otherwise take notice of such fact, if it be a fact.

The record shows that at the September term of the court, and on the day set for the docketing of the petition, as provided in the amended act, Acts 1883, p. 174, section 2, the petitioner filed a notice and affidavits showing that it had been posted along the line of the drain and at the door of the court-house in each of the counties, as the law directs. The notice and affidavits are set out at length in the record. In an entry by the clerk, in which he attempts to give the substance of the affidavits, he omits the statement therein that the notice was posted at the door of the court-house in Howard county. On the same day he made the following entry: "It appearing to the court that notice of the filing of said petition has been given according to law, the same is ordered docketed, and by order of the court said cause is now docketed." The matter was referred to the commissioner without opposition from any one.

Pursuant to the order of the court, they filed their report at the November term. Upon objections being made by appellant, the report was referred back to the commissioners, and they filed an amended report a few days thereafter. Upon

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the filing of this amended report, appellant moved to set aside the reference to the commissioners, because the proper affidavits in proof of notice had not been filed. This motion was overruled. After the filing of a remonstrance by appellant, and the rulings upon it, and at a subsequent term, the petitioner moved for a *nunc pro tunc* entry, so that the recital by the clerk might show the proof of the posting of the notice at the door of the court-house in Howard county. The motion was based upon the affidavits, and an entry on the court's docket as follows: "Proof of notice filed, cause ordered docketed." These affidavits and entry upon the court's docket very clearly furnished sufficient ground upon which to base an order for a *nunc pro tunc* entry. There was, therefore, no error in the making of it. *Chissom v. Barbour*, ante, p. 1, and cases therein cited. Indeed, it is not apparent that under the amended act, Acts 1883, p. 174, section 2, there was any need for such an entry. The affidavits, in the first place, show that the notice was properly posted. In the second place, the entry that the court found that the notice had been posted according to law, and assumed jurisdiction and referred the matter to the commissioners, would seem to be sufficient.

It was held in the case of *Scott v. Brackett*, 89 Ind. 413, that proof of posting notice of the intended petition could be made only by an affidavit. That decision, however, was made under the act of 1881, R. S. 1881, section 4275. That section provided in direct terms, that the proof should be made in that way. It was amended in 1883, Acts 1883, p. 174, sec. 2, and as amended requires that it shall be made to appear to the court that notice has been given, but does not require that it shall be so made to appear by affidavit, nor in any other definitely prescribed manner. We know of no reason why, under this amended act, it may not be by oral testimony.

Appellant was in court and appeared to the motion for the *nunc pro tunc* entry. He can not now object because a notice of that motion was not served on others against whom bene-

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fits were assessed. See *Cool v. Peters Box and Lumber Co.*, 87 Ind. 531.

There is in the record a motion by appellant to dismiss the petition for the reason that the report of the commissioners showed that the costs, damages and expenses of the drain would exceed the benefits to the owners of lands. Following this, leave was granted to amend the report, and the commissioners filed an amended report, in which the benefits to lands are shown to exceed the costs, damages and expenses. The first report is not in the record. We can not know, therefore, that in it the costs, damages and expenses of the drain were shown to exceed the benefits to lands, and can not therefore determine that appellant's motion was in any way well taken, or should have been sustained. The court undoubtedly had the right to allow the commissioners to amend their report. The statute expressly confers such authority. Acts 1883, p. 177. It may as well be done without a remonstrance, as after the defects shall have been pointed out by a remonstrance. As we have said, we can not know what amendment was made, as the amended report only is in the record. In this condition of the record, we must presume in favor of the correctness of the action of the court below in allowing the amendment.

The first cause of remonstrance filed by appellant is a general statement, that the report of the commissioners is not according to law. Under this, he vigorously assails the report. As we have seen, this cause is not sufficiently specific to present any question. We have no way of knowing whether or not the many objections urged here were urged below. It may be, that if they had been, that court would have ordered the report made more specific in some particulars. It is clearly our duty, therefore, if we pass upon the report at all, to disregard such technical defects as would not seriously affect appellant's substantial rights. The report, as we find it in the record, is, in all essential matters, in substantial compliance with the form prescribed by the statute, R. S. 1881,

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section 4284. And while some portions of the report might have been more specific, it is sufficiently certain to be readily understood. It has been held, that a report in substantial compliance with the statutory form is sufficient. *Indianapolis, etc., G. R. Co. v. Christian*, 93 Ind. 360; *Anderson v. Baker*, 98 Ind. 587.

The main argument against the report is, that it locates the portion of the drain in Howard county upon the line of a drain before that time established by the board of commissioners of that county, and that this fact is not, but should have been, developed in the report with specific statements as to how much the old drain was to be deepened and widened. The evidence establishes the fact that the portion of the drain in Howard county is located upon the line of the old drain. Had the court below, upon the establishment of this fact, yielded to the contention of appellant, the only relief that could have been granted under the statute, Acts 1883, p. 177, would have been to refer the report back to the commissioners for an amendment, by inserting the statements contended for by appellant. Possibly, that might have been well, but we can not hold that the statute absolutely required it; and, as it is difficult to see how that would have affected appellant's substantial rights, and as we can not know that these specific objections were brought to the attention of the court below, we can not, and should not, reverse the judgment because the reference was not made.

The petition, notice and report of the commissioners sufficiently show that the drain is to be an open one. The courses and distances and the lands to be affected are very specifically stated and given in the report. Any surveyor could readily locate the drain, and when thus located it will readily appear that it is upon the line of the old drain. It might have been more convenient for appellant to have been informed by specific statements in the report that the drain was located upon the line of the old drain. He might thus be saved the trouble of ascertaining that fact, and the location, by a refer-

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ence to the courses and distances given in the report. And so, in every case, it would be more convenient for the land-owners to be informed by the report that the proposed drain is to follow a certain ravine, or to be parallel with and a certain distance from some line of fence, or established highway or railroad, but such particularity is not required by the statute. The courses and distances are all that the law requires. When these are given, the land-owner may readily ascertain the location of the drain, and whether or not it will be along a line of fence, destroy a private way, follow a ravine, or a formerly established drain. The line being thus given, with the width, depth, fall and slope of the banks of the proposed drain, it can be readily ascertained in what it differs from the old drain. We do not decide, nor intimate a decision, as to what might be a sufficient report, should the commissioners so far depart from the method of drainage proposed in the petition, as to adopt a method by removing obstructions from, deepening, widening or straightening a natural watercourse, etc.

As to the contention by appellant, that one tract of land assessed by the number given to the township is shown to be in Miami county, it is sufficient to say in the first place, that no such question is raised by any cause of remonstrance filed; and in the second place, that the land is clearly shown to be in Howard county, in close proximity to the proposed drain. The other descriptions of the land show this, and that the number of the township is a clerical mistake.

The motion for a new trial below, and the assignment here, that the court below erred in overruling it, present the question as to the sufficiency of the evidence and the rulings of the court below in the admission of evidence. See *Neff v. Reed*, 98 Ind. 341.

In settling the question of the public utility of a proposed drain, the question is not to be split up, and the drain defeated, by proof that it will not be of public utility in one of the counties into which it extends. The question of public

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utility has reference to the drain as a whole, and to the public generally, without regard to the county line that may cross the drain. Upon the question of benefits to appellant's land, the evidence is sharply conflicting. The judgment, therefore, can not be reversed upon the evidence upon this question.

It is further urged here, that the judgment should be reversed because the trial court allowed one, and perhaps more, of appellees' witnesses to give their opinions as to whether or not the proposed drain would be of public utility, benefit any highway, or benefit or damage appellant's land. Such testimony was allowed, and such testimony is incompetent. *Yost v. Conroy*, 92 Ind. 464; *Thompson v. Deprez*, 96 Ind. 67. We think, however, that appellant is not in a position to make this error available for the reversal of the judgment. The record shows that he first adopted the mode of proof by taking the opinions of his witnesses upon all these questions. Having done so, he can not complain that appellees were allowed to meet his case by the same method of proof. *Lowe v. Ryan*, 94 Ind. 450.

There being no error in the record requiring a reversal of the judgment, it is affirmed with costs.

Filed Feb. 19, 1885.

No. 11,425.

JOHNSON ET AL., ADMINISTRATORS, *v.* JOHNSON.

CONTRACT.—*Work and Labor.*—*Evidence.*—Upon the trial of a claim by a daughter-in-law, against the estate of her father-in-law, upon an implied contract for care and nursing during his last sickness, evidence tending to show that she and her husband lived with the deceased in his house as a common family, he hiring domestics, furnishing supplies, and the like, is admissible.

From the Marion Circuit Court.

W. N. Harding, A. R. Hovey and F. Winter, for appellants.

R. B. Duncan, J. S. Duncan, C. W. Smith and J. R. Wilson, for appellee.

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FRANKLIN, C.—This is a claim filed by the appellee against the estate of James Johnson, deceased, “for personal services rendered and performed for said decedent at his special instance and request, in nursing and caring for him in his sickness.” A bill of particulars was filed, amounting to \$965.

Appellants answered in three paragraphs:

First. The general denial.

Second. That the appellee was the daughter-in-law of the decedent, being the wife of his son Isaac B. Johnson, who, at the time of his marriage with the appellee, in the year 1875, was, and for seven years prior thereto had been, a member of his father’s family, and that appellee immediately upon her marriage went, with her said husband, to live with and in the family of her said father-in-law, James Johnson, and thenceforward until his death continued to live with her said husband in said family as members of a common family, and that any services rendered by appellee to said decedent were rendered by her for him as a member of such common family, and not otherwise.

Third. That appellee was fully paid by the decedent in his lifetime for the services mentioned in her complaint.

The case was tried by a jury, and a verdict returned in favor of appellee for \$965, and also answers to certain interrogatories propounded by appellants.

Appellants moved for judgment in their favor upon the answers to the interrogatories, which motion was overruled. They then moved for a new trial, which was also overruled. Judgment was rendered upon the verdict, and the administrators have appealed to this court.

The errors assigned are the overruling of their motion for judgment upon the answers to the interrogatories, notwithstanding the verdict, and the overruling of their motion for a new trial.

Among the reasons for a new trial, the fifth alleges error of law occurring at the trial, and under it a number of specifications are made of the refusal to admit certain testi-

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mony, and the striking out of certain other testimony upon the trial of the cause.

James Johnson, a son of the deceased, testified before the jury that his father, during said time, "bought all the groceries; I know that he bought everything that came into the house to eat, including the meat; and I know he hired the servants." On motion of appellee's counsel the court struck said testimony out, and refused to let the jury consider it.

Appellants' counsel then offered to prove by said witness that the decedent furnished the domestics and servants to do the work in his household, under the supervision of Mrs. Isaac Johnson; that he furnished a servant to do the washing for the household, including the claimant's, her husband's and her husband's son; that he furnished all the provisions for the use of the family; that he furnished the furniture that was used by the family; and that the family lived in his house on his farm. The admission of this testimony was refused by the court.

The court permitted appellants to prove by John Johnson, a son of decedent, that during said time the claimant lived in his father's house, but refused to let them prove by said witness that decedent, during said time, furnished everything for all the family, including claimant, her husband and his son, to live upon, and furnished all the hired help and domestic servants for the whole family; that her husband, Isaac B. Johnson, was during said time the financial agent of decedent, and as such paid all the expenses of the whole family out of decedent's means, and that during said time decedent had made to claimant valuable gifts, at one time a silk dress worth \$60.

This testimony was offered for the purpose of proving that they all lived together as one family, and to rebut any understanding that she was to receive pay for such services; but the court excluded the testimony. We think the facts that the decedent furnished all the means for the whole family to live upon, and that claimant's husband acted as decedent's financial agent in paying for the same, tended to prove that they

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all lived as one family, and it was competent and proper for the defendants to prove the facts and circumstances under which the parties lived together in order for the jury to determine whether they all lived together as one family, and whether there was any understanding between them that she should be paid for her services. No express agreement between them that she should be paid for her services was proved in the case.

We think the court erred in refusing to permit said evidence to go to the jury, and for this error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to grant a new trial, and for further proceedings.

Filed Feb. 14, 1885.

No. 11,811.

SIBERT v. COX.

WILL.—Construction.—Charge of Support and Education of Children.—A devise of land to the children of the testator's deceased son in fee simple, with the addition of these words, "It is my desire and intention that the mother of said children shall use and occupy said land until the youngest of said children shall become twenty-one years of age, to support and educate said children," gives the mother an estate in the land until the youngest child reaches full age, charged, however, with the support and education of the children, and such devise is not upon condition of her personal occupancy of the land.

SAME.—Guardian.—In such case, where it appears that the children of the testator's deceased son have resided with their mother, and it is not shown that she has been unable or failed to educate or support her children, a guardian of such children can not call upon her for any portion of the rents and profits of said land; and if the guardian has collected the rents of said land, he must account to the mother for them.

From the Bartholomew Circuit Court.

Sibert v. Cox.

N. R. Keyes, for appellant.

S. Stansifer, for appellee.

BLACK, C.—Jacob Sibert died testate, in Bartholomew county, in 1880, being the owner in fee simple of certain land, eighty acres, in said county. By his will, which was duly probated, he devised said real estate as follows:

“Item eight. I will, devise and bequeath to my grandchildren, Cora Belle Sibert, John T. Sibert and Jacob T. Sibert, in fee simple, share and share alike, the following real estate situate in Bartholomew county, Indiana: The eighty acre tract purchased by me of Jake McDonald, and the same occupied by my son John T. Sibert in his lifetime, the same being north of the land owned by Simpson Rutherford, and the same occupied by said children and the widow of said John T. Sibert, deceased. It is my desire and intention that Adeline Sibert, the mother of said children, shall use and occupy said land until the youngest of said children shall become twenty-one years of age, to support and educate said children.”

This was an action brought by said Adeline Sibert, the appellant, against the appellee James Cox, the plaintiff alleging that the defendant wrongfully took possession and assumed control of said land and rented it and collected the rents thereof, and for the five years last before the commencement of the action so received and collected said rents, all without the leave or license of the plaintiff; that the rent of said land for said time was worth an amount stated, which was due and owing from the defendant to the plaintiff; that during said time said youngest child was not of age, and he was not yet of age, and that the plaintiff had demanded of the defendant a settlement and accounting for said rents, but that the latter had failed and refused, and he still failed and refused, to pay or account for the same or any part thereof.

The defendant answered, in substance, that on the 29th of October, 1880, he was appointed by the court below and duly qualified as guardian of said children, who then were and who

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still were infants under the age of twenty-one years; that he still was such guardian; that as such guardian he took charge of said real estate and collected the rents, the same sued for in this action; that the plaintiff, with her said children, of her own accord, resided elsewhere all the time since before the defendant's appointment as such guardian; that he had appropriated said rents to the proper support of said children, the necessary repair of said land, and proper expenses of said guardianship, said wards having no other estate or property.

On demurrer, this answer was held sufficient; and the overruling of this demurrer is alone assigned as error.

In construing the will, the intention of the testator is to be sought for in its provisions, and it is to be given effect if not contrary to law.

It may be gathered from the clause quoted, that the land in question had been occupied by the testator's son, who was deceased, and that it was occupied by the three grandchildren and their mother, the children and widow of the testator's said son. The testator gave the land to said grandchildren in fee simple, but provided that their mother should use and occupy it until the youngest of the children should become twenty-one years of age, to support and educate said children.

This provision conferred on the plaintiff an estate during the period of the youngest child's minority. *Whittome v. Lamb*, 12 M. & W. 813; *Rabbeth v. Squire*, 19 Beav. 70; *Fillingham v. Bromley*, Turn. & Rus. 530, 536.

The devise was not conditional upon personal occupancy of the land by the widow, and she would have the right, consistently with the expressed purpose of the testator, to let it to rent. *Rabbeth v. Squire*, *supra*; *Maclaren v. Stainton*, L. R. 11 Eq. 382; *Stone v. Parker*, 29 L. J. Ch. 874.

The mother was to use and occupy the land, to support and educate the children. A trust was created in favor of the children. But when we consider the relationship of the plaintiff to said children, and the facts, that the land had been occupied by her husband in his lifetime, and that at the making

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of the will it was occupied by the family of the testator's son, the plaintiff and her children, we can not conclude that it was the testator's intention that the plaintiff should have no beneficial interest in the land. She held the land as her own during the prescribed period, but out of it she was to provide for the support and education of the children.

By statute, she, and not the guardian, was entitled to the custody of the persons and the control of the education of her minor children, unless she was an unsuitable person. Section 2518, R. S. 1881.

If she was unable or failed to educate the children, it would be the duty of the guardian to provide for them such education as the amounts of their estates would justify. Section 2521, R. S. 1881.

It appears that the children have resided with their mother. It does not appear that she has not had the control of their education, or that she has been unable or has failed to educate them, or that she has been unable or unwilling to support them. Under the statute, the guardian is to have the management of his ward's estate during minority, and is to manage it for the best interests of the ward, and is to collect all just debts due the ward. Sections 2518, 2521, R. S. 1881.

If the plaintiff failed to perform her trust, performance might be enforced against her, and she might be compelled to devote a reasonable portion of the income of the land to the support and education of the children.* But the land was not a part of the estate to be managed by the guardian. The children were not to receive any certain specified amounts; their reasonable support and education were to be provided for. Only to this extent could the mother be called upon to pay out of the proceeds of the land. If it became the duty of the guardian to provide, out of their estates, for the support or education of his wards, he could call upon her to such extent. He had no right to the land. If he could show that the plaintiff neglected or refused to perform the trust created by the will, he might still be held for the actual rental value

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of the land, less the amount of the proceeds received by him which he had devoted to the purpose indicated in the will.

We think that the answer was insufficient.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellee, and the cause is remanded, with instructions to sustain the demurrer to the answer.

Filed Feb. 12, 1885.

No. 11,828.

THE CITY OF AURORA v. BITNER ET AL.

PRACTICE.—*Weight of Evidence.*—Where evidence tends to sustain the verdict, the Supreme Court will not disturb it on the weight of the evidence.

SAME.—*Excessive Damages.*—A verdict will not be disturbed on the ground of excessive damages, unless they appear, at first blush, to be grossly excessive.

MUNICIPAL CORPORATION.—*Negligence.*—*Streets.*—It is the duty of municipal corporations to keep all their streets in a reasonably safe condition for travel, so as not to endanger the persons and property of those lawfully using them, and they are liable for negligently suffering the streets to become unsafe.

SAME.—*Notice of Defect in Streets.*—*Time.*—A municipal corporation is liable for injuries caused by its neglect or omission to keep its streets in a safe condition for travel, as well as for those caused by defects occasioned by the wrongful acts of others, where the corporation has actual or constructive notice of the defect which caused the injury. Notice to the corporation of the unsafe condition of a street may be inferred from the length of time it has existed, as well as from other facts and circumstances. What is such a length of time must, in a great measure, depend on the circumstances of the particular case, and must, in most cases, be a question of fact to be submitted to the jury.

SAME.—*Crossing Constructed by Private Person.*—A municipal corporation is not exempted from its liability for defects in a crossing by the mere fact that it was constructed by a private person. If such crossing is constructed in a public street, where the public pass on foot, and the same gets out of repair and becomes unsafe, and remains so for such a length of time that the proper authorities, in the exercise of reasonable care and prudence, ought to have discovered the defect and repaired it, the corporation is liable for the negligence, without actual notice.

The City of Aurora v. Bitner *et al.*

From the Dearborn Circuit Court.

C. S. Jelley, for appellant.

O. F. Roberts and *D. H. Staff*, for appellees.

COLERICK, C.—This action was brought by the appellees against the appellant, to recover damages for injuries alleged to have been received by the appellee Mary Bitner, by falling while walking over a defective gutter crossing in the city of Aurora, Indiana. The complaint consisted of three paragraphs, to each of which a separate demurrer was overruled. An answer in two paragraphs was filed, to which the appellees replied. The action was tried by a jury, who returned a verdict in favor of the appellees and assessed their damages at \$400, upon which verdict, over a motion for a new trial, judgment was rendered against the appellant, from which it has appealed to this court, and assigns as errors the rulings of the court upon said demurrers, and on the motion for a new trial.

It is unnecessary for us to examine the first and third paragraphs of the complaint for the purpose of determining their sufficiency, as the record shows that the verdict was based alone on the second paragraph of the complaint, and hence, even if error was committed by the court in overruling the demurrers to the first and third paragraphs, it was harmless and unavailable. See *McComas v. Haas*, 93 Ind. 276; *State v. Julian*, 93 Ind. 292; *Bartlett v. Pittsburgh, etc., R. W. Co.*, 94 Ind. 281; *Louisville, etc., R. W. Co. v. Davis*, 94 Ind. 601; *Hawley v. Smith*, 45 Ind. 183; *Blessing v. Blair*, 45 Ind. 546; *Blasingame v. Blasingame*, 24 Ind. 86; *Keegan v. Carpenter*, 47 Ind. 597.

The appellant insists that the second paragraph of the complaint was insufficient in this, that it failed to show with sufficient certainty that the appellant was guilty of any negligence, either in the construction of the crossing or in maintaining it after its construction, and that the injury occurred without the fault or negligence of the injured person. We think the complaint, in these respects, was sufficient. It averred "that

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on the 26th day of November, 1881, and for more than five years previous thereto, the defendant kept and maintained within the corporate limits of said city a gutter crossing, crossing from Judiciary street in said city across the gutter running along the west side of said street to the sidewalk on the opposite side of said gutter; that said crossing consisted of boards placed lengthwise with said street, and at right angles with and on two cross pieces of timber parallel with each other and extending across said gutter; that said crossing was continuously used by the citizens of said city and by the public for the purpose of crossing over said gutter; that for more than — days before the time of the injury hereinafter complained of, the defendant allowed the boards of said crossing to become loose and insecure, and that the defendant had notice that said crossing was in an insecure and dangerous condition for more than two days prior to the time of said injury, but that she wholly failed, neglected and refused to repair the same; that on the 26th day of November, 1881, the plaintiff Mary Bitner was crossing said gutter from the west side thereof, in company with Mrs. Mary Cattell, and that while they were so crossing the same, the said Mary Bitner was walking near the side of said crossing, and not suspecting or knowing the dangerous, unsafe and treacherous condition of such crossing, and without any fault, carelessness or negligence on her part, stepped on the outer end of one of the boards of such crossing, which board, being loose on account of the failure and neglect of the defendant to fasten the same as aforesaid, flew up at the opposite end thereof, and just in front, and within a foot, of the plaintiff Mary Bitner, as she was in the act of taking a step forward, when she, without any fault or negligence on her part, but by reason of the aforesaid negligence of the defendant, and before she could control the volition of her body, stumbled and fell over such uplifted board, down upon said gutter crossing," whereby she was injured, etc.

It is the duty of municipal corporations to keep all of their

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streets in a reasonably safe condition for travel, so as not to endanger the persons and property of those lawfully using them, and they are liable for negligently suffering them to become unsafe. *Murphy v. City of Indianapolis*, 83 Ind. 76; *Higert v. City of Greencastle*, 43 Ind. 574; *Grove v. City of Fort Wayne*, 45 Ind. 429; *City of Lafayette v. Larson*, 73 Ind. 367; *City of Delphi v. Lowery*, 74 Ind. 520; *City of Huntington v. Breen*, 77 Ind. 29, and cases cited.

In this case, the facts averred showed that the appellant was guilty of negligence in permitting the street to become unsafe for travel, and it was explicitly averred that the injury occurred "without the fault or negligence" of the appellee Mary Bitner. This paragraph of the complaint was sufficient, and, therefore, the demurrer was properly overruled.

The only reasons assigned in support of the motion for a new trial, that have been urged in this court, are, that the verdict was not sustained by sufficient evidence, that the damages were excessive, and that the court erred in giving and refusing certain instructions to the jury. We have carefully examined the evidence and find that it tends to sustain the verdict, and hence we can not disturb the verdict on the weight of the evidence. This court, in cases like this, will not disturb a verdict on the ground of excessive damages, unless they appear at first blush to be grossly excessive. See *City of Evansville v. Worthington*, 97 Ind. 282, and cases cited. The damages awarded the appellees were much less than the jury would have been justified under the evidence in assessing, as the injuries received, for which they were given as a compensation, were of a serious and dangerous character.

The only instruction given by the court, that appellant has assailed in its brief, was as follows: "6. If you believe from the evidence that the gutter crossing in question was constructed on a public street in said city of Aurora, by a private person, and not under the direction or supervision of the city, still this would not exempt the city from liability for defects in said gutter crossing, provided the jury believe

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from the evidence that said gutter crossing was so out of repair as to be dangerous for ordinary travel, and that the defect was known to the proper authorities of the city, or that, by the exercise of ordinary care, they might have known of such defect before the injury complained of." This instruction is to be considered in connection with the instruction immediately following it, which related to the same subject, and was as follows: "7. If the jury believe from the evidence that said gutter crossing was constructed on one of the streets of said city of Aurora, where the public pass on foot, and that the same got out of repair and unsafe for persons to pass over, and remained so for such length of time that the proper authorities of said city, in the exercise of reasonable care and prudence, ought to have discovered the fact, then actual notice to such authorities of the condition of the gutter crossing is not necessary to hold the city liable for injury sustained by the plaintiff Mary Bitner in consequence of the dangerous condition of the gutter crossing, if she herself used reasonable care to avoid such injury."

The only imperfection, if any, in these instructions was the omission of the court to state that, in order to render the appellant liable for the injury complained of, it was necessary for the appellees to prove that the crossing had remained in an unsafe condition for ordinary travel for a sufficient length of time not only to have enabled the appellant, in the exercise of ordinary diligence, to have discovered its unsafe condition, but also to have repaired the same, or resorted to such measures as might be necessary to protect and guard from accident persons who might pass over the crossing without knowledge of its unsafe condition. See *Turner v. City of Indianapolis*, 96 Ind. 51. But the appellant was not injured by reason of the omission of the court to so charge the jury, as the uncontradicted evidence rendered at the trial clearly showed that sufficient time for those purposes intervened after the crossing became unsafe for travel and before the injury occurred.

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A municipal corporation is liable for injuries caused by its neglect or omission to keep its streets in a safe condition for travel, as well as for those caused by defects occasioned by the wrongful acts of others, where the corporation has actual or constructive notice of the defect which caused the injury. Dillon Mun. Cor. (3d ed.), section 1024; *Higert v. City of Greencastle*, *supra*; *Grove v. City of Fort Wayne*, *supra*; *City of Huntington v. Breen*, *supra*; *Town of Elkhart v. Ritter*, 66 Ind. 136.

Notice to the corporation of the unsafe condition of a street may be inferred from the length of time it has existed, as well as from other facts and circumstances. See *City of Indianapolis v. Murphy*, 91 Ind. 382, and cases there cited. What is such a length of time as will charge the corporation with such notice must, in a great measure, depend upon the circumstances of the particular case, and must, in most cases, be a question of fact to be submitted to the jury. *Board, etc., v. Dombke*, 94 Ind. 72.

No available, if any, error was committed in giving the above instruction.

The only instruction refused by the court that the appellant, in its brief, has discussed, was as follows:

"3. If you believe from the evidence that the gutter crossing mentioned in plaintiffs' complaint was built, constructed, and maintained after it was constructed, by private individuals, and after it was so constructed was never adopted by the city of Aurora as a part of her general system of street improvements, then, and in that event, said city of Aurora was not bound to keep said gutter crossing in repair, and if you find from the evidence that plaintiff Mary Bitner received the injury complained of by reason of said gutter crossing being unskillfully constructed or being out of repair, said city of Aurora would not be responsible in damages for such injury, and your verdict should be for the defendant."

This instruction was in direct conflict with instruction No.

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6, given by the court, as above set forth, and, for the reasons stated by us in the consideration of that instruction, did not contain a correct statement of the law, and, therefore, was properly refused by the court.

As there is no error in the record, the judgment should be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Feb. 25, 1885.

No. 10,965.

ANDERSON v. WILSON ET AL.

PLEADING.—*Cross Complaint.*—*Process.*—As to co-defendants who are parties to a cross complaint, its filing is the commencement of a new action, and, for that purpose, it is a new pleading to enforce a separate and distinct right.

SAME.—*Requisites of Cross Complaint.*—While, in this State, it is not necessary, under the code, to pray process in accordance with the former chancery practice, but process issues as a matter of course on the filing of a complaint, yet the parties against whom relief is demanded must be clearly designated by name in the complaint as defendants. But as to matters of mere description and identification, many of the allegations of the original complaint may be referred to in the cross complaint, even if the original action has been dismissed.

JUDGMENT.—*Conclusiveness.*—*Collateral Attack.*—Where a court of general jurisdiction has cognizance of a matter in controversy, and of the parties, its decree is binding on all other courts, until it is reversed or set aside by some appropriate proceeding for that purpose. It can not be attacked collaterally. It is conclusive as to all matters therein embraced, including the findings as to parties before the court. There can be no judicial inspection behind a judgment or decree save by appellate power.

BANKRUPTCY.—*Effect on Pending Proceedings.*—*Jurisdiction.*—The fact, that a complainant or cross complainant is declared a bankrupt while proceedings are pending on his complaint or cross complaint, does not defeat the jurisdiction of the court.

MORTGAGE.—*Subrogation.*—*Presumption.*—A purchaser of land paying off a

100	402
126	160
100	402
138	373
139	296
100	402
140	440
100	402
148	456
149	605
100	402
154	379
100	402
158	310
100	402
159	592

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mortgage thereon can not be subrogated to the rights of the mortgagee without the payment of the purchase-money. Such payment will not be presumed, but must be proved by him.

From the Tippecanoe Circuit Court.

J. S. Scobey, for appellant.

W. C. Wilson and *J. H. Adams*, for appellees.

MITCHELL, J.—The facts in this case, as they are set out in the amended complaint, are, briefly, that the appellant, in January and February, 1873, by two separate deeds acquired title to certain lands in Tippecanoe county from one Horn and wife, for the consideration of \$4,500. At the time the land was conveyed it was subject to a mortgage, held by one Mayo, upon which there was due about \$1,996, the payment of which the appellant assumed as part of the purchase-price. Prior to the conveyance, Horn and wife had executed a mortgage on the same land to secure an indebtedness due from Horn to one Vorhis for about \$1,060. This mortgage was subsequent in date to the Mayo mortgage, and appeared to be satisfied and cancelled of record at the time of the purchase by appellant from Horn. Soon after the conveyance by Horn to the appellant, Mayo filed a bill in the Tippecanoe Circuit Court to foreclose his mortgage, making the Horns, Vorhis and the appellant parties defendants. While this bill was pending, the appellant paid off Mayo's mortgage, and his suit was dismissed; but a few days before the dismissal Vorhis filed a cross bill, setting up his mortgage and alleging that the cancellation and satisfaction appearing of record had been procured by fraud and without consideration, and asking to have it set aside, and for a decree of foreclosure.

It is charged in the complaint that Vorhis fraudulently concealed from the appellant the fact that he had filed a cross bill until after appellant had paid off the Mayo mortgage, which it is averred he paid off by the advice of Vorhis, who knew that the appellant at the time such payment was made had no knowledge of the filing of the cross bill,

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and who represented that the payment of the Mayo mortgage would free the land from incumbrance.

It appears from the complaint that some time after the Mayo mortgage was paid off, process was issued and served on the appellant and the other defendants in the Mayo case, to answer the cross complaint of Vorhis, and that subsequently a decree was entered, the appellant having made default, setting aside the cancellation of the Vorhis mortgage, and foreclosing the appellant's equity of redemption in the land. Still later, the land was sold by the sheriff to William C. Wilson and Jay H. Adams to satisfy the decree so rendered in favor of Vorhis. Wilson and Adams were made parties below, it being averred that they were the attorneys of Vorhis, and had knowledge of the facts imputed to him.

The relief which the appellant asks in his bill is: 1. That the decree in favor of Vorhis be declared junior to the Mayo mortgage, which the appellant paid, and that the appellant be subrogated to the rights of Mayo, and that Vorhis be decreed to pay the appellant the amount which was paid by him to satisfy the Mayo mortgage, with interest. 2. That the decree in favor of Vorhis be declared fraudulent and void.

The court sustained a demurrer to the complaint.

It is contended by counsel for the appellant, that the decree rendered on the cross complaint of Vorhis was void, because no summons was issued on it until after the dismissal of the original action. The argument is, that the filing of a complaint is not the commencement of a suit, and that the suit by cross complaint was not commenced until a summons was delivered to the sheriff, and that this not having been done until after the original action was dismissed, it was necessary that there should be a new complaint making new parties, and that because this was not done the decree which followed was a nullity. Conceding counsel's premise, that neither an action, nor cross action, can be said to be pending until process is served, it does not follow that when process

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does issue, and a decree is given, against parties duly summoned, all the proceedings including the decree are invalid and void.

The proceeding before us is one in which a decree of the circuit court is subjected to a collateral attack, and it is conceded that unless that decree was invalid and void, the appellant has no ground to complain of the ruling of the court below.

Filing a cross complaint was substantially the commencement of a new action by Vorhis against his co-defendants, and the complaint was, for that purpose, a new pleading to enforce a separate and distinct right. *Meredith v. Lackey*, 16 Ind. 1; *Fletcher v. Holmes*, 25 Ind. 458.

The decree which was rendered on the cross complaint is assailed on the ground that no parties are named in the cross complaint; that it does not name the court in which it is filed, and that the appellant is nowhere named in the bill.

A copy of the cross bill is made part of the amended bill in this record. Its caption is as follows: "Henry S. Mayo v. John Horn *et al.* No. 2586. Ambrose S. Vorhis, one of the defendants in the above entitled cause, by way of answer and cross complaint against all his co-defendants, says," etc. After setting up the note and mortgage executed to him by Horn and wife, and the cancellation of the mortgage of record, and the supposed causes which entitled him to have the cancellation of the mortgage set aside, it concludes with a prayer for a decree setting aside the release entered by him, and for judgment and the foreclosure of the mortgage, "and that the claim of this defendant be found prior to all liens and claims of all parties hereto, and other proper relief."

In chancery pleading, it was a rule almost universal, that no persons were considered defendants except those against whom process was prayed. Barbour Parties to Action, p. 450; Story Eq. Pl., section 44.

In *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 437, it is said,

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in substance, that no persons are considered parties defendants in a bill in chancery except those against whom process is prayed, or who are specifically named and described in the bill. And in *Elmendorf v. Delancey*, 1 Hopkins, 555, Chancellor SANDFORD said: "When it is uncertain who are complainants, or who are the persons called to answer, the suit is fundamentally defective; and if the parties are not clearly designated, it is the fault of him who institutes the suit." See, also, 1 Daniell Ch. Pr., p. 286.

In the case of *De Wolf v. Mallett*, 3 Dana, 214, it was held that the process alone, and the return upon it, govern the question of who are parties, and as, under our code, process issues as a matter of course, upon the filing of a bill or complaint, no prayer for process is necessary in the bill, and, consequently, the omission of the names of the defendants in the prayer of the bill is of no consequence. It is necessary, nevertheless, that the persons against whom relief is demanded must be designated in the bill by a clear statement of their names, and no person can be deemed a party defendant to a bill except such as are therein specifically named and described as defendants. *Talmage v. Pell*, 9 Paige, 410; *Green v. McKinney*, 6 J. J. Mar. 193.

In the case of *Winslow v. Winslow*, 52 Ind. 8, this court held that an answer which asked affirmative relief was bad, because, as the court said, "it should have made parties thereto."

Conceding that, as an original bill, the cross bill was inherently defective for want of a specific designation of parties defendants, or the parties against whom the relief was asked, two questions yet remain: 1. Could the papers and the record in the original case in which the cross bill was filed be looked to in order to uphold the decree? and, 2. Even if this could not be done, the court having, by its process, acquired jurisdiction of the person of the appellant, and having jurisdiction of the subject-matter, will this court look to the com-

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plaint, or anywhere behind the decree itself, when it is brought in question collaterally?

It was held in *Gardner v. Fisher*, 87 Ind. 369, that while a cross complaint must be in itself substantially sufficient to maintain an action in favor of the cross complainant independently of the averments of the complaint, yet, for matters of mere description and identification, many of the allegations of the complaint in the original action may be referred to. And in *Sidener v. Davis*, 69 Ind. 336, it was said that notwithstanding the original action might be dismissed, the papers remained on file, and were subject to be referred to in support of averments in the cross bill.

The circuit court of Tippecanoe county is a court of general jurisdiction, in which the matters alleged in the cross bill were cognizable. It acquired jurisdiction by its process of the appellant, and having jurisdiction of the subject-matter and the parties, its decree is binding upon this and all other courts until reversed or set aside by some appropriate proceeding.

One of the inquiries which the court necessarily made before giving its decree against the appellant, was as to the parties over whom it had acquired jurisdiction and against whom its decree was to be given, and the decree having been given against him, it will be conclusively presumed that the court found he was a party against whom relief was asked. Whether the court decided correctly or not, is not before us. It is enough that it so decided.

As was said by BALDWIN, J., in *Grignon v. Astor*, 2 How. 319: "There can be no judicial inspection behind the judgment save by appellate power," and, "If the jurisdiction of the court in a civil case is not alleged in the pleadings, the judgment is not a nullity, but though erroneous, is obligatory as one." And in *Thompson v. Tolmie*, 2 Peters, 157, it was said: "If the court had jurisdiction the purchaser is not bound to look behind the decree." *Ex Parte Watkins*, 3 Pe-

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ters, 193; *Dequindre v. Williams*, 31 Ind. 444; *Million v. Board, etc.*, 89 Ind. 5; *Davidson v. Koehler*, 76 Ind. 398, and cases there cited; *Whittlesey v. Frantz*, 74 N. Y. 456.

The complaint before us does not bring this case within the doctrine of those cases where judgments have been set aside on account of fraud practiced in obtaining the judgment, and the suggestion made concerning the bankruptcy adjudication need not be further noticed. The fact that Vorhis, pending the proceedings on his cross bill, was adjudged a bankrupt, would not defeat the jurisdiction of the court.

Independent of all other considerations, we think the demurrer to the bill before us was properly sustained, for want of equity, even admitting that the decree which was rendered on the cross bill was nugatory.

By the facts shown in the bill, it appears that the appellant purchased the land in controversy for the consideration of \$4,500. He assumed the payment of the Mayo mortgage, and whatever representations Vorhis made which induced him to pay it off, his payment of it was nothing more than the discharge of an obligation which he had already assumed.

It does not appear whether his deed from Horn contained covenants against incumbrances or not, nor does it appear that at the time Vorhis notified him by summons of his claim, to have the release of his mortgage set aside, he had paid the balance of the purchase-price of the land, nor, indeed, does it appear that it is yet paid. We can not presume that the purchase-money has been paid (*Anderson v. Hubble*, 93 Ind. 570; 47 Am. R. 394), and unless it has, the appellant has no equity which entitles him to be subrogated to the position of Mayo.

The judgment is affirmed, with costs.

Filed Feb. 12, 1885.

Indiana, Bloomington and Western Railway Company v. Allen.

No. 11,503.

INDIANA, BLOOMINGTON AND WESTERN RAILWAY COMPANY v. ALLEN.

RAILROADS.—Right of Way.—Measure of Damages.—The damages for taking the right of way for a railroad upon condemnation are measured by the value of the land taken and any injury to the rest of the tract through which it extends.

SAME.—Condemnation.—Notice.—Practice.—Filing exceptions to the inquest in proceedings to assess damages for right of way taken by a railroad company is a waiver of notice.

SAME.—Construction of Statute.—Sheriff.—Jury.—In such proceedings, under sections 887 and 925, R. S. 1881, the requirement that the sheriff shall charge the jury is merely directory, and its omission does not affect the proceedings.

SAME.—Damages.—When and to Whom They Accrue.—When a railroad takes possession and builds its road upon the lands of another without appropriation or condemnation, as the statute provides, the damages then accrue to the owner, and a subsequent conveyance of the whole tract gives the grantee no right to any damages.

SAME.—Guardian and Ward.—A guardian can not grant to a railroad company a right of way upon lands of his infant ward.

From the Fountain Circuit Court.

C. W. Fairbanks, L. Nebeker and H. H. Dochterman, for appellant.

T. F. Davidson, for appellee.

BICKNELL, C. C.—This was an application by the appellee, as owner of land, for a writ of assessment of damages under section 909, R. S. 1881.

The application was a complaint alleging the plaintiff's ownership of the southeast $\frac{1}{4}$ of section 31, of town. 20 north, of range 8 west, and the appropriation of a part thereof by the defendant, describing that part by metes and bounds, the same being a strip 100 feet wide extending from east to west across the whole quarter section, alleging that the defendant had built thereon its main track and a side track, claiming authority therefor under the railroad act of May 11th, 1852, but had never filed an instrument of appropriation, nor in-

100	409
128	36
100	409
181	180
100	409
149	179

100	409
183	32

100	409
189	146
1169	147
e170	59

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stituted any assessment proceedings, and that no damages for the taking of said strip of land had ever been assessed, or paid, or tendered. The complaint demanded a writ to assess the value of the strip taken, and the damages to the residue of said quarter section.

The court issued the writ in accordance with sections 886, 887, 907, 908 and 909, R. S. 1881. The writ and assessment were duly returned. The return showed a meeting of the jurors at the time and place appointed; that the parties were duly notified thereof; that the jurors were then and there duly empanelled and sworn, and then and there assessed the damages of the applicant at \$880, to wit, \$280 as the value of the strip taken, and \$600 as damages for the injury to the residue of said quarter section.

Section 896, R. S. 1881, provides that the defendant "may appear and traverse any material fact therein stated in the inquest, or he may plead or show any valid matter in bar of the right of the plaintiff to have the benefit of such writ; and issues of law and of fact may be made up and tried, * * * and proceedings had as in other actions." See *Marion, etc., R. R. Co. v. Ward*, 9 Ind. 123; *Indianapolis, etc., R. R. Co. v. Newsom*, 54 Ind. 121; *Church v. Grand Rapids, etc., R. R. Co.*, 70 Ind. 160. There was no demurrer to the application.

The defendant filed a writing of which the first two paragraphs were answers to the complaint, and the last five paragraphs were exceptions to the assessment, and were numbered 3, 4, 5, 6 and 7.

The first paragraph of answer was struck out on the plaintiff's motion; a motion to strike out the second paragraph of answer was overruled. A motion by the plaintiff to strike out all of the defendant's exceptions to the assessment was overruled.

The plaintiff also excepted to the assessment, and a demurrer to his exceptions was sustained. Defendant's exceptions to the assessment numbered 4, 5, 6 and 7 were overruled by the court.

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The plaintiff replied to the second paragraph of the defendant's answer in two paragraphs, of which the first was a general denial. He also filed a denial of the defendant's exception to the assessment numbered 3.

The defendant moved to strike out the second paragraph of the reply, and he also moved to strike out a part of said second paragraph of reply, and these motions were overruled.

The matter was submitted to the court for trial on the complaint, the writ, the assessment, the second paragraph of answer, the defendant's exception to the assessment numbered 3, and the plaintiff's denial thereof, and the plaintiff's reply to said second paragraph of answer.

The court found for the plaintiff. The defendant moved for a new trial for the following reasons :

1 and 2. Excessive damages.

3 and 4. That the finding is not sustained by and is contrary to the evidence.

5. Error in the admission of evidence, to wit, a deed from the plaintiff to Bartlett Fields for all of said quarter section except the strip taken by the defendant.

The motion for a new trial was overruled. Judgment was rendered for the plaintiff for the amount of the assessment and costs. The defendant appealed.

There are fourteen specifications of error, but the second, third and fourth are not proper assignments of error; they belong to the reasons for a new trial. The fourteenth specification is not available, because the alleged action of the court therein asserted is not shown in the record. The remaining specifications of error are as follows :

1. Overruling the motion for a new trial.

5. The complaint does not state facts sufficient, etc.

6. Striking out the first paragraph of the answer.

7, 8, 9, 10 and 11. Overruling the defendant's exceptions to the assessment numbered 4, 5, 6 and 7.

12. Overruling the motion to strike out the second paragraph of the reply.

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13. Overruling the motion to strike out a part of second paragraph of the reply.

There was no error in overruling the defendant's exceptions to the assessment numbered 4, 5, 6 and 7. Exceptions 4 and 5 allege that the defendant was not properly notified of the assessment.

The sheriff's return shows that the defendant was served with a sufficient notice of the time and place and purpose of the assessment, to wit: "To assess the damages sustained by James L. Allen, the plaintiff in the above entitled cause, by reason of the taking by the defendant in said cause, the Indiana, Bloomington and Western Railway Company, of the following described premises," to wit: Then follows a description of the strip of land taken by metes and bounds, the same as that given in the complaint. A copy of the notice is annexed to the return.

The damages for taking such a strip of land across a quarter section embrace the value of the strip and any injury to the residue of the quarter section naturally resulting from such taking. *White Water Valley R. R. Co. v. McClure*, 29 Ind. 536; *Montmorency G. R. Co. v. Stockton*, 43 Ind. 328; *Baltimore, etc., R. R. Co. v. Lansing*, 52 Ind. 229. And see as to the sufficiency of notice as shown by a return: *Colerick v. Hooper*, 3 Ind. 316; *Holsinger v. Dunham*, 11 Ind. 346. In *Swinney v. Fort Wayne, etc., R. R. Co.*, 59 Ind. 205, 219, it was held that a party, by appearing and filing exceptions to an assessment, waives any objection to the service of the notice.

The sixth exception to the assessment alleges that the sheriff did not charge the jury as required by sections 887 and 908, R. S. 1881. We think the provision requiring the sheriff to charge his jury as to their duty must be regarded as merely directory. *Potter Dwaris Stat. 222*. There was, therefore, no error in overruling the sixth exception.

The seventh exception is that the jury did not take and subscribe an oath as required by law. Section 911, R. S.

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1881, provides that the sheriff shall administer the proper oaths to jurors. Section 887, R. S. 1881, shows that the jury is to be empanelled and sworn. The sheriff's return shows that the jurors took and subscribed the oath thereto attached; the oath and the signatures of the jurors thereto affixed are annexed to the return. The jurors severally swear that they will to the best of their ability assess the damages sustained by the plaintiff from the taking by the defendant of the land described in the application and writ, and will assess at their true cash value the land so taken and the damages sustained by reason of said taking. There was, therefore, no error in overruling the seventh exception to the assessment.

The controlling question, presented in several ways by the other specifications of error, so far as they are discussed in the appellant's brief, is the question whether, under the facts proved and agreed upon in this case, the appellee was entitled to any damages either for the value of the strip taken, or for the consequential injury to the residue of the quarter section. The facts as agreed upon in the court below are as follows: In 1855, Martha E. Brittingham, then Martha E. Thompson, owned said quarter section and continued to own and possess it until August, 1882. In 1869 the strip of land aforesaid was taken by the Indiana, Crawfordsville and Danville Railroad Company, who in that year built the same railroad thereon now operated by the appellant, and said road was constructed and operated with the knowledge of said Martha E. Brittingham and without objection from her, and has been operated daily ever since its construction by the appellant and its predecessors in ownership, said defendant having succeeded to all the rights and ownership of its predecessors. In August, 1882, Martha E. Brittingham and her husband conveyed to the plaintiff by warranty deed the whole of said quarter section, and this deed is the appellee's only source of title. The plaintiff and his wife on May 1st, 1883, conveyed to Bartlett M. Fields by

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warranty deed all of said quarter section except the strip of land aforesaid, and Fields is now, and ever since said conveyance has been, in possession of all of said quarter section except said strip. The plaintiff has never owned any land adjoining said quarter section. The sheriff's jury allowed the plaintiff \$600 for injury to said quarter section outside of said strip, and \$280 for the value of said strip, which was its true value.

The foregoing was all the evidence in the cause, except that the plaintiff was permitted, over the objections of the defendant, to give in evidence the deed aforesaid from himself and wife to Bartlett Fields for all of said quarter section except said strip. In this deed the grantors reserved "all right of action of every kind and nature against the Indiana, Bloomington and Western Railway Company, or its predecessors, and all right to prosecute proceedings for the assessment of damages for the taking and occupancy of said premises, or any part thereof, by said company, for the use of its railroad, and the right to all damages done to said premises by reason of such taking and occupancy."

Upon this testimony, we think it appears clearly that the appellee was not entitled to any damages for the strip of land taken or for the injury done to the remainder of the quarter section. When he bought the quarter section, the railroad was upon it; it is fair to presume that the existence of such an incumbrance affected the price paid.

When the strip of land was taken, the quarter section belonged to Martha E. Brittingham; the right to recover all the damages then belonged to her; that right was a chose in action; it did not pass to appellee by the warranty deed from Mrs. Brittingham and her husband. No assignment is alleged, and the rule is that damages to land remaining uncollected do not pass to a vendee. *Church v. Grand Rapids, etc., R. R. Co., supra*. "The right to the compensation accrues and takes effect at the time of the taking, though it may be ascertained and declared afterwards. It belongs, therefore, to

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the person who is the owner at the time of the taking, and does not, without an express stipulation, pass to a purchaser by a subsequent conveyance, although containing covenants of warranty." *Pierce R. R.* 185.

Under the foregoing authorities, the finding was not sustained by the evidence, and was contrary to law. The appellee was not entitled to any of the damages claimed.

The appellant's objection to the admission in evidence of the deed from the appellee to Bartlett Fields ought to have been sustained; that deed did not, in any respect, tend to sustain the cause of action stated in the complaint; the appellee had no right of action for damages to reserve.

There was no error in striking out the first paragraph of the appellant's answer. In that paragraph, the appellant relied on a grant of the right of way by a guardian of Mrs. Brittingham while she was a minor. The guardian had no authority to make such a grant. *Indiana, etc., R. W. Co. v. Brittingham*, 98 Ind. 294.

The twelfth and thirteenth specifications of the appellant's assignment of errors are not available. *House v. McKinney*, 54 Ind. 240; *Losey v. Bond*, 94 Ind. 67.

The appellee's cross errors charge error in sustaining the appellant's demurrers to the appellee's exceptions to the assessment numbered 2 and 3, and in overruling the appellee's motion to strike out the second paragraph of the appellant's answer. It is not an available error to overrule a motion to strike out a pleading.

The appellee's exceptions to the assessment allege that the jury did not allow the appellee anything for the value of the iron and cross-ties on said strip of land, which are of the value of \$10,000.

The appellee's claim seems to be that when a railroad company takes a strip of land, and with the knowledge of the owner, and without his objection, builds thereon a railroad, afterwards, when, under the statute, damages are claimed for the appropriation of the land, the company having a right by

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law to take the land on making proper compensation, the jury in assessing such damages must add thereto the value of the company's rails and cross-ties laid down upon the strip of land taken. Such a claim can not be sustained.

We have considered all the matters discussed by the parties. The judgment ought to be reversed for the error of the court in overruling the appellant's motion for a new trial.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Filed Feb. 14, 1885.

No. 11,916.

MERRITT v. RICHEY.

PLEADING.—*Answer in Abatement.*—*Pendency of Prior Action.*—*Demurrer.*—*Error.*—It is error to sustain a demurrer to a verified answer in abatement setting up that a prior action, between the same parties and for the same cause of action, is pending and undetermined on appeal in the Supreme Court.

From the Clinton Circuit Court.

J. V. Kent and *J. W. Merritt*, for appellant.

J. N. Sims, for appellee.

HOWK, J.—This was a suit by the appellee Richey against the appellant Merritt, to recover the possession of certain real estate in Clinton county, and damages for having been kept out of the possession thereof. The cause was put at issue and tried by the court, and a finding was made for the appellee, and judgment was rendered accordingly; and from this judgment this appeal is prosecuted.

The first error of which complaint is made, in argument, is the decision of the court in sustaining appellee's demurrer to the appellant's amended answer.

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This action appears from the record to have been commenced in the trial court, on the 20th day of September, 1883. The amended answer was pleaded by the appellant in abatement of this action, on the ground that a prior suit, commenced in the same court on the 6th day of May, 1881, between the same parties, and involving, as does this action, the appellee's title to and right to the possession of the land in controversy, was then pending and undetermined on appeal in the Supreme Court. This amended answer was duly verified by the oath of the appellant, and therein he prayed that the present action abate and be held in abeyance until the appeal in the former suit was determined by this court. The answer was very full in its averments, and was very long. Without attempting to summarize the answer, it will suffice for us to say that sufficient facts were stated therein, we think, to withstand the appellee's demurrer, and to entitle the appellant to the relief prayed for. It clearly appeared from the facts stated in the answer, and admitted to be true by appellee's demurrer, that this action ought not to have been prosecuted to final judgment, until the appeal in the former suit had been determined. We conclude, therefore, that the court erred in sustaining the demurrer to appellant's answer. *Loyd v. Reynolds*, 29 Ind. 299; *Dawson v. Vaughan*, 42 Ind. 395; *Moore v. Kessler*, 59 Ind. 152.

Another error complained of, in argument, by the appellant's counsel, is the sustaining of appellee's demurrer to appellant's cross complaint. Since this cause was decided below, the appeal in the former suit, between the same parties and in relation to the same land, has been decided by this court, and the opinion of the court, in that case, is reported under the name of *Merritt v. Richey*, 97 Ind. 236. In that case the appellant was the plaintiff below, and the object of his suit was to have the sheriff's sale and deed, under which the appellee Richey claimed title to the land then and now in controversy, set aside by the decree of the court. A

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demurrer was sustained to the complaint in that case, but on appeal, after setting out the substance of the complaint, this court said: "This complaint was unquestionably good." The facts stated in that complaint were substantially the same as those alleged in the cross complaint in the case at bar. Upon the authority of the case last cited, and for the reasons there given, we must hold in this case that the cross complaint was unquestionably good, and that the demurrer thereto ought to have been overruled.

The judgment is reversed with costs, and the cause is remanded with instructions to overrule the demurrers to the amended answer and the cross complaint, and for further proceedings not inconsistent with this opinion.

Filed Feb. 14, 1885.

No. 10,993.

IDDINGS v. PIERSON ET AL.

PARTNERSHIP.—Notice of Dissolution.—Promissory Notes.—After the dissolution of a partnership, if one partner executes a note in the individual names of both partners (not the firm name), for goods in the line of the partnership business, sold and delivered to him on the firm's credit by one who had dealt with the firm, and had no knowledge of the dissolution, no notice thereof having been given, the note will bind both.

From the Hendricks Circuit Court.

T. Hanna and *S. A. Hays*, for appellant.

C. L. Stanley and — *Talbott*, for appellees.

COLERICK, C.—This action was brought by the appellant against the appellees upon a note alleged to have been executed by them to him. The appellee Pierson submitted to a default, and the appellee Greenlee filed an answer in one paragraph, in which he denied, under oath, the execution by him, or by any other person authorized to act for him, of the note sued upon. The case was tried by a jury, and resulted in the rendition of a verdict in favor of the appellant against Pier-

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son for the amount of the note, and in favor of Greenlee. The appellant moved the court for a new trial as against Greenlee, which motion was overruled, and thereupon a judgment was rendered in accordance with the verdict. From the judgment rendered in favor of Greenlee the appellant has appealed to this court. The only error assigned is the overruling of the motion for a new trial. The reasons alleged in support of the motion were, that the verdict as to Greenlee was not sustained by sufficient evidence, and that the court below erred in giving and refusing certain instructions, and in admitting and rejecting certain evidence, which instructions and evidence are specified in the motion.

It appears by the evidence, which is in the record, that prior to the execution of the note sued upon, the appellees were partners in the mercantile, grain and cattle business, and that the note was given for grain or cattle sold by the appellant after the dissolution of the partnership, and delivered by him to Pierson, who then alone was carrying on the business. The note was prepared and delivered by Pierson, who signed his own name thereto, as well as that of Greenlee. It was not executed in the name of the firm, but in the names of the members thereof. The appellant sought to hold Greenlee liable on the note, on the ground that no notice of the dissolution of the firm had been given, and that appellant, who was a former customer of the firm, did not know, at the time of the sale of the property and the execution of the note, that the firm had been dissolved, and that Greenlee had retired therefrom as a member, but supposed and believed that he was still a member, and evidence to establish these facts was introduced by him on the trial.

The court refused to give to the jury, at the request of the appellant, the following instruction:

“When a partnership is formed for an indefinite period, it is supposed to continue as to persons having dealings with such partnership until they have legal or actual notice of its dissolution. And if you find from the evidence that defend-

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ants, prior to the execution of the note in suit, were partners, and that plaintiff, prior to that time, had dealings with them, with notice that they were partners, and if you find that the plaintiff, not having notice of the dissolution of such partnership, sold cattle and wheat, or either of them, and delivered the same to defendant Pierson, believing at the time that he was dealing with said firm, and on the faith and credit of said firm, the defendants would both be liable to plaintiff for such articles, and if in settlement of said debt the defendant Pierson executed the note in suit and signed his own name and the name of the defendant Greenlee, then both defendants would be bound thereby, and you should find for the plaintiff, if the purchase of such articles of cattle or wheat was in the line of the business carried on by said firm, and plaintiff, at the time of the execution of said note, had no notice of any dissolution of said firm."

The court erred in refusing to give this instruction. The law applicable to the facts in the case, as claimed by the appellant, and which the evidence introduced by him tended to establish, is correctly stated in the instruction, and was not covered by, nor embraced in, any instruction given to the jury.

In order "To establish the liability as partners of defendants who have dissolved partnership, it must appear: 1, that the plaintiff, at the time the contract was made under which his account accrued, knew that the defendants had been in partnership; 2, that he was ignorant of their dissolution; and 3, that he made the contract supposing he was contracting with the defendants as partners, and in reliance upon their joint liability." 1 Lindley Part. 407, note. *Pratt v. Page*, 32 Vt. 13; *Benton v. Chamberlain*, 23 Vt. 711; *Wade Law of Notice*, sec. 487.

The necessity imposed by the law upon the appellant of establishing, by proof, the three facts above alluded to, with others, to entitle him to recover against Greenlee on the note, was clearly and explicitly stated in the instruction.

In *Hunt v. Hall*, 8 Ind. 215, it was said by this court:

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“The rule is, that ‘all the partners may be bound after the dissolution of the partnership, by a contract made by one partner, in the usual course of business, and in the name of the firm, with a person who contracted on the faith of the partnership, and had no notice of the dissolution.’” The rule, as stated in the case last cited, was also recognized and reiterated by this court in the cases of *Stall v. Cassady*, 57 Ind. 284, *Uhl v. Harvey*, 78 Ind. 26, and *Backus v. Taylor*, 84 Ind. 503.

If the note mentioned in the instruction was given under the circumstances therein mentioned, Greenlee, as well as Pierson, was bound by it. A note given within the scope of the business of a partnership by one of the partners, in the names of all the partners, binds all of them, because partners are mutual agents of each other in all things relating to the partnership business. *Maiden v. Webster*, 30 Ind. 317. See, also, *Caldwell v. Sithens*, 5 Blackf. 99; *Nelson v. Neely*, 63 Ind. 194; *McGregor v. Cleveland*, 5 Wend. 475. But a note given by one partner in opposition to the dissent of his co-partners, manifested before or at the time of its execution, of which the payee of the note at the time of its delivery had knowledge or notice, will not bind the partner so dissenting, without evidence of his subsequent assent or ratification. See *Moffitt v. Roche*, 92 Ind. 96. A retiring partner, who desires to avoid liability for future debts of the new firm, which may be contracted by it, must cause notice of his retirement to be given. *Stall v. Cassady*, *supra*. As stated in *Uhl v. Harvey*, *supra*, “The only just rule is an absolute requirement that the retiring partner shall give proper notice of his withdrawal, and, failing to do so, from whatever cause, must suffer the consequences.” If no such notice is given, he will be liable for the subsequent contracts of the partnership made with one who knew of the former existence of the firm, and did not know of his withdrawal at the time of the contract, and made such contract upon the faith and credit of all the partners. *Backus v. Taylor*, *supra*.

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For the error of the court in refusing to give this instruction the judgment must be reversed.

In view of the conclusion reached by us, it is unnecessary to consider the other questions presented for our consideration, as they may not arise on another trial of the action.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellee Greenlee, and the cause is remanded, with instructions to the court to sustain the motion for a new trial as to Greenlee, and for further proceedings in accordance with this opinion.

Filed Jan. 30, 1885.

No. 12,022.

PAUL ET AL. v. DAVIS.

DESCENTS.—*Adoptive Child.*—*Adoptive Parents.*—Where a husband and wife jointly adopt a child, and the child so adopted dies, without children or their descendants, the owner of land inherited from the adoptive mother, the surviving husband and adoptive father will inherit such land in preference to the natural mother.

STARE DECISIS.—*Bona Fide Purchaser.*—Judicial decisions are evidences of the law, but where they are not long established, and are palpably erroneous and plainly productive of injustice, they should be overruled, and a party who buys lands during a pending litigation can not hold it as a *bona fide* purchaser solely on the ground that in former decisions the court had declared the law to be as claimed by his grantor.

From the Montgomery Circuit Court.

G. W. Paul and *J. E. Humphries*, for appellants.

E. C. Snyder, *P. S. Kennedy* and *S. C. Kennedy*, for appellee.

ELLIOTT, J.—The facts in this case are substantially the same as in the case of *Humphries v. Davis*, ante, p. 274. The only element of fact present here that was absent there is, that the appellants purchased part of the lands in controversy of Elizabeth Krug, the mother of Emily Davis, the adopted child of Isaac Davis and his wife Jessie Davis.

The principal question in this case is set at rest by the

100	422
124	43
100	422
138	800
100	422
142	502

100	422
169	533

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cases of *Krug v. Davis*, 87 Ind. 590, *Davis v. Krug*, 95 Ind. 1, *Humphries v. Davis*, *supra*, and *Humphries v. Davis*, *ante*, p. 369. The status of parent and child, created by our statute providing for the adoption of children, determines the right of inheritance as to property which descends to the adoptive child from its adoptive parents, and casts it upon the adoptive father in preference to the natural mother.

We shall not again enter upon a full discussion of this subject, but there are some points developed in the argument of this case which deserve discussion.

The adoptive child does become the stirps or stock of inheritance, but to whom does it sustain this relation as to property acquired by inheritance from the adoptive parents? Doubtless, this relation exists between such a child and its children; they are of the original stock of descent, for they bear the relation of grandchildren to the adoptive parents. The legal relation does not end with the death of the adoptive child, and so the line of descent goes back, in default of wife or children, to the source from which the property came. This is strictly equitable and in harmony with principle. *Hyatt v. Pugsley*, 33 Barb. 373; *Valentine v. Wetherill*, 31 Barb. 655; Bingham Desc. 53; 4 Kent Com. 409. The natural mother is not of the stock from which the property came to the child which was given in adoption to others, and between her and that stock there is a gap which is not bridged by any statute or by any principle of justice. It is strictly consistent with justice, with principle and with our statutory scheme of descents, to prefer the adoptive father to the natural mother in cases where the adoptive father was the original stock of inheritance. The natural mother is as to that stock an utter stranger, and, as to property descending from that stock, has suffered another to fully occupy the status of parent with all of its legal incidents. Where the adoptive child dies under circumstances such as would, in a similar case, cast the inheritance upon the father of a natural child, the adoptive father inherits the property which the

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adoptive child acquired by virtue of the status fixed by the act of adoption.

We are referred to the case of *Cloud v. Bruce*, 61 Ind. 171, where it was said: "The statute is full and complete. It provides 'for every conceivable case;' that is, by its provisions all the property of a decedent can be legally awarded to a legal recipient." There is nothing in that decision opposing what we hold here. We hold that the statute providing for the adoption of children, justly interpreted, and construed so as to give it a position in a uniform system of jurisprudence, does provide that the adoptive father shall take from the adoptive child to the exclusion of the natural mother. The difficulty with counsel is, that they look to the statute on the subject of adoption as though it stood alone, forming in itself a complete system and exhausting the whole subject. This view is much too narrow. When the statute fixed, as by providing that such adopted father or mother shall occupy the same position that he or she would if the natural father or mother it did fix, the status of the parties, both parent and child, it supplied the means of determining their legal rights. Legal rights are determined by the status of the persons concerned, and the status here is fixed. What the rights flowing from that status are can only be ascertained by looking to the rules and statutes constituting the great body of law of which the statute creating the status simply forms a part.

When the statute on the subject of adopting children was engrafted into our jurisprudence, it necessarily effected some changes, and made necessary, as does every change, some readjustment of parts. A new rule can not be incorporated into any system without making it necessary to so change the system as that the new rule shall fall into its proper place in one uniform system of jurisprudence. The readjustment made necessary by the statute under immediate mention is not a radical one, nor is it a jarring one; all that is necessary is that the adoptive parent shall be deemed entitled, by virtue of his legal status, to the place of a natural father in

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so far as concerns the rights operated upon, and, in truth, created by the new statute. These are the rights of succession to the property vested in the adoptive child by force of the law, and not by virtue of heritable blood. Appellants quote from the case of *Ross v. Ross*, 129 Mass. 243, S. C. 37 Am. R. 321, this language: "But this section must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere." But counsel while quoting, so far as they go, the language of the court correctly, do not quote it all, and they thus give a palpably wrong meaning to the language used. The court applied its remarks to the general statute of descents, and not to the statute providing for the adoption of children. It was speaking of one statute, but counsel wrench the language from its connection and give it a radically different meaning from the one the court intended it to have, by applying it to an altogether different statute. There can be no question that counsel are profoundly in error, for nothing can be plainer or more unequivocal than the language of the court. "He who runs may read." We decide here, as was decided in that case, that the general statute of descents does not define the status of parent and child for all cases, and that the status of parent and child, so far as rights growing out of the statute on the subject of adoption are concerned, and so far as concerns property operated upon by it, is created by the statute just mentioned, and not by the general statute. The decision is, therefore, against, and very strongly against, the position upon which counsel plant their principal position. Taking together as parts of one great system of jurisprudence the general statute of descents, with its legal incidents, and the statute for the adoption of children, it is very plain that there is a statutory

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provision fixing the status, and when we ascertain the status we have secured the key to the main position, for from the status of the persons interested flow the legal right, interest and title.

There is no force in the argument that the appellants are entitled to hold as *bona fide* purchasers because the court decided in the case of *Barnhizel v. Ferrell*, 47 Ind. 335, that an adoptive parent would be excluded and preference given to the natural kinsmen of the child. If, in any case, the purchaser has a right to buy upon the faith of a judicial decision, and use it as an invulnerable shield, the appellee would not have the right in such a case as this. The facts in this case and in the former case are essentially different, and the reasoning in one earlier and two later cases strongly impeached the soundness of the case relied upon by appellants. In the earlier case of *Barnes v. Allen*, 25 Ind. 222, it is clearly implied that the relation between the adoptive parent and the adoptive child is that of parent and child, with the reciprocal right of inheritance. In the later cases of *Isenhour v. Isenhour*, 52 Ind. 328, and *Krug v. Davis*, *supra*, the reasoning of the court is even more strongly against the position assumed in *Barnhizel v. Ferrell*, *supra*. The law was, therefore, in an unsettled condition, and the appellants bought when this was the condition of affairs, and while Davis was, as they knew, stoutly contesting the right of their grantor to deprive him of the property of which his wife and his adopted daughter had died the owner.

A judicial decision does not make unalterable law, nor is it law in the sense that statutes are law. It was justly said by Senator Platt, in *Yates v. Lansing*, 9 Johns. 415, that "The decisions of courts are not the law; they are only evidence of the law." In another case it was said: "I hope we shall consider what a decision really is, and treat it accordingly; not as the law, nor as giving the law, but simply as evidence of the law: and not conclusive evidence, but only *prima facie* evidence of what the law is." *Henry v. Bank of Salina*, 5 Hill, 535. Chancellor Kent says: "Even a series of de-

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cisions are not always conclusive evidence of what is law ; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule and the extent of property to be affected by a change of it." Again he says: "It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error." 1 Kent Com. 477. The Lord Chancellor of England said to the House of Lords: "You are not bound by any rule of law which you could lay down, if, upon a subsequent occasion, you should find reason to differ from that rule, that is, like every court of justice, and I regard this as a court of justice; it is inherent in the nature of every court of justice that it should have liberty to correct any error into which it may have fallen." *Bright v. Hutton*, 12 Eng. L. and Eq. R. 1, *vide* p. 15. In the case cited the earlier case of *Hutton v. Upfill*, 2 H. L. Cases, 674, was overruled, although it was a case growing out of the same subject-matter, and involving the same principle and substantially the same interests. The law is a science of principles, and this can not be true if a departure from principle can be perpetuated by a persistence in error. If it be correct to affirm that there can be no departure from former decisions, then it would be true, as it has been well said, that "In such cases '*summum jus*' might be '*summa injuria*.'" Ram Legal Judg. 201.

The Supreme Court of California, in discussing this general subject, said: "But it is a solecism to say that causes should be tried upon wrong principles—be decided against the law—whether it be for the purpose of justice or not, so to decide them. The law is not so false to itself as to require its own permanent overthrow, unless the subversion be necessary to the public interests; and whether it be so necessary in a given case or not, is for the court to decide, as a

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matter of legal discretion, whenever the rule is invoked.” *Hart v. Burnett*, 15 Cal. 530, *vide op.* 607. Consistency purchased by adherence to decisions at the sacrifice of sound principle is dearly bought. But we deem it unnecessary to further pursue this discussion, for we know quite well that there is not a court in England or America that has not corrected erroneous departures from the principles of justice by overthrowing previous decisions. The question was presented in *Hibbits v. Jack*, 97 Ind. 570, as it is here presented, and was decided, after careful consideration, as we now decide it.

Much as we respect the principle of *stare decisis*, we can not yield to it when to yield is to overthrow principle and do injustice. Reluctant as we are to depart from former decisions we can not yield to them, if, in yielding, we perpetuate error and sacrifice principle. We have thought it wisest to overrule outright rather than to evade, as is often done, by an attempt to distinguish where distinction there is none. We have preferred the censure that sometimes falls upon us rather than undertake to distinguish, and thus make “confusion worse confounded,” where there is no room to limit or distinguish. *Hines v. Driver*, 89 Ind. 339.

In this instance the case which was in part overruled in *Krug v. Davis*, *supra*, is a single case upon an isolated question, affecting very few persons, and upon a subject recently introduced into our law. There is therefore no principle of public policy violated and no extensive property rights affected by its overthrow. These considerations bring the case very fully within the reasoning of *Hines v. Driver*, *supra*. But more important than these considerations is the fact that it was necessary to depart from *Barnhizer v. Ferrell*, *supra*, in order to do justice, harmonize the law for the adoption of children with our general system of descents and with the latest expression of legislative intent manifested in the act of 1883.

Judgment affirmed.

Filed Feb. 10, 1885.

Shorb v. Kinzie.

No. 11,606.

SHORB v. KINZIE.

INSTRUCTIONS.—Admissions.—It is fatal error to instruct the jury that evidence of verbal admissions made some time ago are subject to imperfection and mistake, and should be cautiously received, because the party may not have expressed his own meaning, or may have been misunderstood, and the witness may not give the exact language, and thereby change the meaning; but admissions deliberately made against interest, and well understood, are entitled to consideration: nevertheless the jury are the exclusive judges of the weight of the evidence.

SIGNATURE.—Misconduct of Counsel.—The genuineness of a signature was in issue by an answer under oath, purporting to be signed by the party, but this was not put in evidence, nor was there any evidence that the name was written by the party. In argument his attorney was permitted, over objection, to hand the affidavit and paper in dispute to the jury, that they might judge of the handwriting by comparison, which they did.

Held, that this was error.

From the Whitley Circuit Court.

J. W. Adair and W. F. McNaghy, for appellant.

W. Olds and H. S. Biggs, for appellee.

BLACK, C.—This was an action brought by the appellee against the appellant upon a promissory note executed by the latter to the former. Issues were formed, a trial of which before a jury resulted in a verdict for the plaintiff, on which judgment was rendered, a motion for a new trial made by the defendant having been overruled. The overruling of this motion is assigned as error. The court gave the following instruction to the jury:

“There has been some evidence given of admissions by the plaintiff, and upon this branch of the case the law is that verbal admissions or statements, consisting of mere repetitions of oral statements made some time ago, are subject to much imperfection and mistake, for the reason that the party making them may not have expressed his or her own meaning, or the witness may have misunderstood him or her, or, by not giving their exact language, may have changed the

100	480
126	110
100	480
149	70
100	420
166	480

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meaning of what was said. Such evidence should, therefore, be received by the jury with great caution. But admissions deliberately made and well understood are entitled to your consideration, especially when made against a party's own interest. The jury are the exclusive judges of the weight of the evidence."

Under *Newman v. Hazelrigg*, 96 Ind. 73, *Finch v. Bergins*, 89 Ind. 360, *Davis v. Hardy*, 76 Ind. 272, and *Garfield v. State*, 74 Ind. 60, we think this instruction must be held erroneous. The last sentence in the instruction does not save the entire instruction from error. It did not withdraw the preceding matter, often held by this court to be objectionable, but left it to control the judgment of the jury.

It was alleged in the answer, that when the note in suit became due, the plaintiff represented to the defendant that the former had lost it; that thereupon the defendant made full payment of the note to the plaintiff and took his receipt therefor, a copy of which was filed with the answer as part thereof. To this the plaintiff replied, denying payment and denying that he ever executed said receipt. This reply was verified by an affidavit signed "George Kinzie," and purporting to have been "subscribed and sworn to before" the clerk. It is shown by bill of exceptions, that this affidavit was not read or introduced in evidence in the cause, "and the signature thereto was not admitted to be the plaintiff's genuine signature, unless the fact that said reply was filed as a reply in the case constituted an implied admission of such genuineness, but it was in no other way admitted or conceded that said signature was the genuine signature of plaintiff."

One of the plaintiff's attorneys, in his argument before the jury, handed said affidavit to the jury, with said receipt, which had been put in evidence by the defendant, and told the jury that the signature to the affidavit was the plaintiff's genuine signature, but that he had not signed the receipt; and said attorney asked the jury to compare said signatures, for the purpose of determining whether the plaintiff had

Shorb v. Kinzie.

signed the receipt; and upon said request each juror examined said signatures and compared them for such purpose. To all this the defendant objected for the expressed reasons that said affidavit was not in evidence; that it was not a paper in the case; that the pretended signature of the plaintiff thereto was not admitted to be genuine; that the jury had no right to compare said signatures; that they could only look at the evidence in the case in reaching a verdict; but the court overruled the objection.

Comparison of handwritings is a mode of proof by which, if it be not carefully guarded, judicial tribunals are liable to great imposition. The relaxation of the rules concerning this class of evidence should never be so far extended as to permit the use of uncertain standards of comparison. While in this State we permit comparisons by experts, using as standards writings irrelevant to the case, we have not, as have the courts of some other States, permitted the establishing of the genuineness of such irrelevant papers by means of other evidence. We require that the irrelevant standard to be used by the expert shall be a writing the genuineness of which is admitted by the party adverse to the one offering to make the comparison; and in such case we do not permit the standard to be examined by the jury.

In thus allowing the use of irrelevant standards of comparison, we admit a class of evidence not allowed by the English common law. We also recognize what has been called an exception to the common law rule disallowing comparison of handwritings, in that where a writing admitted to be genuine is already in evidence for some other purpose, and has thereby become a paper subject to be examined by the jury, it may be used as a standard with which the jury may compare what purports to be a writing of the same person, the genuineness of which as such is in dispute in the case. Where the comparison may thus be made by the jury, they may make it either with or without the aid of experts. *Chance v. Indianapolis, etc., G. R. Co.*, 32 Ind. 472; *Burdick v. Hunt*, 43

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Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Shank v. Butsch*, 28 Ind. 19; *Forgey v. First Nat'l Bank*, 66 Ind. 123; *Hazzard v. Vickery*, 78 Ind. 64; *Shorb v. Kinzie*, 80 Ind. 500. See, also, 1 Greenl. Ev., section 578; Whart. Ev., section 713; *Moore v. U. S.*, 91 U. S. 270; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Miles v. Loomis*, 75 N. Y. 288; S. C., 31 Am. R. 470.

Our statute (section 364, R. S. 1881) provides that where a pleading is founded on a written instrument, or such instrument is therein referred to, such instrument may be read in evidence on the trial of the cause without proving its execution, unless its execution be denied by pleading under oath, or by an affidavit filed with the pleading denying the execution.

Whether such an affidavit of a party may be submitted by the adverse party to the jury for the comparison of handwritings, we need not here determine, and we do not decide.

A witness whose knowledge of a party's handwriting has been obtained by seeing him write for the purpose of showing his true manner of writing to the witness, with a view to his testifying, will not be permitted to testify his belief as to the genuineness of the signature in question. *Reese v. Reese*, 90 Pa. St. 89, S. C., 35 Am. R. 634, quoting Lord Kenyon's saying in *Stranger v. Searle*, 1 Esp. 14, "The defendant might write differently from his common mode of writing his name, through design."

In *King v. Donahue*, 110 Mass. 155, S. C., 14 Am. R. 589, where a general rule in relation to standards of comparison by the jury much less strict than ours was stated, it was held that a party was not entitled to write her signature in the presence of the jury for the purpose of its being compared with a signature purporting to be hers in evidence, the genuineness of which she denied. It was said: "The rule however seems to be that a signature made for the occasion, *post litem motam*, and for use at the trial, ought not to be taken as a standard of genuineness, and that the jury should not be troubled with the additional issue or question whether the signature so offered is written in a constrained and forced manner or not."

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The genuineness of the signature given as a standard of comparison by the appellee to the jury was not established in any manner, at least as against the appellant. As was said on a former appeal of this case (*Shorb v. Kinzie*, 80 Ind. 500), "A claim that a signature is genuine by a party who seeks to use it is no admission at all."

If such a signature as the one now in question can be assumed in any instance to be the genuine handwriting of the party whose signature it purports to be, and upon such assumption alone can be submitted to the jury as a standard of comparison, we think that a party can not be permitted, in denying in pleading the execution of an instrument, to make a specimen of handwriting to be used by himself on the trial of the cause as a standard by which the jury shall test the genuineness of the handwriting in dispute. To hold otherwise would be to invite imposition through a class of evidence which, at best and when most carefully guarded, is not very reliable.

But, if a party might be permitted during the introduction of the evidence to thus submit to the jury such a signature as an undisputed and undeniable standard of his ordinary handwriting, for the comparison therewith by the jury of the signature in issue, the adverse party would have the opportunity, under our rule, of introducing expert witnesses to aid the jury in further comparison; and the submission to the jury made for the first time upon the argument after the close of the evidence, if in any view allowable, would deprive the adverse party of this privilege.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellee, and the cause is remanded for a new trial.

Filed Feb. 18, 1885.

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Eslinger v. East et al.

No. 10,818.

ESLINGER v. EAST ET AL.

PRACTICE.—Instructions.—Where instructions given and refused have not been filed as the statute, section 533, R. S. 1881, requires, but are in the record by a bill of exceptions which fails to show any exception taken to the giving or refusal, no question thereon can be made in the Supreme Court.

SAME.—Continuance.—Absence of Counsel.—Practice.—Counter affidavits are not allowed upon a motion for a continuance, and the absence of the principal counsel in a cause, suddenly called away on account of illness of a relative, very shortly before the call of the cause for trial, justifies a continuance in the discretion of the court.

LIQUOR LICENSE.—Evidence.—Upon an application for license to sell liquors, evidence showing the location of the proposed place of business, with reference to the court-house, a college and public school, and that it is on a street necessarily much used by school children, is admissible.

From the Lawrence Circuit Court.

J. W. Buskirk, H. C. Duncan and J. M. Cropsey, for appellant.

G. W. Friedley, J. E. Henley and W. H. East, for appellees.

MITCHELL, J.—The appellant brings this appeal and asks us to review the proceedings of the court below, wherein on the verdict of a jury an adverse judgment was rendered on his application for license to sell intoxicating liquors.

The application was made to the board of commissioners of Monroe county, where a remonstrance was filed by the appellees, challenging his fitness on the ground of immorality, the habit of becoming intoxicated, etc.

The applicant's petition was dismissed by the board on the motion of the remonstrants, and after an appeal to the circuit court the venue was changed to Lawrence county, where a trial was had with the result stated.

It is insisted that a continuance of the cause granted at the September term, 1882, on the application of the remonstrants, showing the unavoidable absence of counsel on whom they relied, was error, both because the affidavit on which the

100	434
135	418

100	431
137	60
138	19
139	213
100	434
145	463

100	434
158	698

100	434
170	568

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application was based was insufficient, and because the court refused to hear a counter affidavit contradicting that upon which the continuance was asked.

An application for a continuance must be determined upon the facts stated in the affidavit supporting it. Counter affidavits can not be received. *Cutler v. State*, 42 Ind. 244.

From the affidavit upon which the continuance was asked it is made to appear that the remonstrants' principal counsel was suddenly called away, a short time before the case was called up for trial, on account of the illness of his father; and we think a continuance of the cause was, under the circumstances, no abuse of the discretion of the court.

The appellant's counsel also contend that error was committed by the court in giving certain instructions to the jury of its own motion, and in refusing others asked by them. These instructions are set out in the bill of exceptions containing the evidence, but there is nothing either in the bill of exceptions or elsewhere in the record showing that the instructions asked and refused, or those given by the court, were presented and filed as required by section 1849, R. S. 1881.

As exceptions were not otherwise saved to these instructions, and for the omission of the record to show that those contained in the bill of exceptions were filed, we can not consider them. *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110; *Cunningham v. Baker*, 84 Ind. 597; *Indianapolis, etc., R. R. Co. v. Pugh*, 85 Ind. 279.

It is next contended that the court erred in not sustaining the appellant's objection to the following question propounded to R. W. Miers, a witness called by the remonstrants:

"State where the plaintiff's building in which he is applying for license is situate, with reference to the public square in Bloomington, and to the college and the graded school buildings, and how many school children usually pass the building in going to and returning from school."

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The court permitted this question to be answered, over the appellant's objections, to which exception was reserved.

It is strenuously urged by appellant's counsel, "that since the Legislature has not seen fit to restrict the sale of intoxicating liquors to certain localities, but made it universal, location is no test," and that nothing was involved in the inquiry save only the fitness of the applicant to be entrusted with a license. This may be conceded, and yet we are not prepared to say that the question was improper.

The statute requires the applicant for license to state in his notice "the precise location of the premises in which he desires to sell," doubtless with the view, in part, at least, that the citizens of the neighborhood may be apprised of the fact, that it is proposed to secure the right to retail intoxicating liquors to be drank on the premises in that vicinity, and we are not persuaded that although the inquiry must always be as to the fitness of the applicant to be entrusted with the sale of intoxicating liquor, involving his morality, habits of sobriety, etc., the Legislature may not have intended that such fitness should have some relation to the locality where it is proposed to set up the business. It may well have been supposed that in determining the fitness of things, a court or jury might take into account whether, under all the evidence, an applicant in a particular case was a fit person to be entrusted with the sale of intoxicating liquors, if the place proposed was such that only a man possessed of an extraordinary degree of circumspection and caution could fitly conduct the business at that place, with a due regard to the situation and surroundings. At all events, we can not see how any harm could have come to the appellant from the question and answer.

The judgment is affirmed.

Filed Jan. 27, 1885.

Conwell v. Conwell.

No. 11,724.

CONWELL v. CONWELL.

100	437
140	160

PLEADING.—Exhibits.—Judgment.—The transcript of a judgment need not be filed with the complaint, and if filed is no part of the record, and will not be considered upon demurrer to the complaint, even if it shows that the court which rendered the judgment had no jurisdiction.

From the Grant Circuit Court.

A. Steele and R. T. St. John, for appellant.

J. L. Custer, for appellee.

COLERICK, C.—This action was brought by the appellant upon a judgment rendered in her favor in the circuit court of Champaign county, Illinois. The complaint consisted of two paragraphs, to each of which a separate demurrer, on the ground that the same did not state facts sufficient to constitute a cause of action, was sustained. The appellant declining to amend her complaint, final judgment, on demurrer, was rendered against her, from which she has appealed to this court, and assigns as errors the rulings of the court upon said demurrers.

The material averments in both paragraphs of the complaint were alike. In each it was averred, in substance, that the appellee was indebted to the appellant in the sum of \$1,100 upon a judgment "duly rendered and pronounced by the circuit court of Champaign county, in the State of Illinois," in her favor against the appellee. A copy of the judgment and proceedings in the action in which it was rendered was filed with the complaint. It was also averred that said court "had full power and complete jurisdiction of the matters in litigation in said action," and of the persons of the parties thereto. A provision of the statutes of Illinois, authorizing personal service of process without the State upon defendants in actions instituted in the courts of the State, was recited, but it was not alleged in the complaint, nor did the facts therein averred show, that the defendant in said action was served with

Conwell v. Conwell.

process without the State. It was also averred that said judgment was due, in full force, unreversed, and unappealed from, and wholly unpaid. Wherefore, etc.

The only objections that have been urged against the sufficiency of the complaint are based upon matters appearing in the transcript of the proceedings and judgment filed with the complaint. None of these objections can be considered, as the transcript is not a part of the complaint.

A judgment is not a "written instrument" within the meaning of the statute which provides that "When any pleading is founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading," etc., R. S. 1881, section 362, and, therefore, a copy or transcript thereof need not be filed with a pleading founded upon it. *Lytle v. Lytle*, 37 Ind. 281; *Robb v. City of Indianapolis*, 38 Ind. 49; *Campbell v. Cross*, 39 Ind. 155; *Brooks v. Harris*, 41 Ind. 390; *Hinkle v. Reid*, 43 Ind. 390; *Law v. Vierling*, 45 Ind. 25; *McCaffrey v. Corrigan*, 49 Ind. 175; *White v. Webster*, 58 Ind. 233; *Mull v. McKnight*, 67 Ind. 525; *Dunning v. Rogers*, 69 Ind. 272; *McSweeney v. Carney*, 72 Ind. 430; *Jones v. Levi*, 72 Ind. 586; *Hopper v. Lucas*, 86 Ind. 43; *Cosgrove v. Cosby*, 86 Ind. 511. And if so filed it does not become a part of the pleading, and can not be examined or considered for the purpose of determining the sufficiency or insufficiency of the pleading. Its sufficiency must be tested and determined without reference to the transcript. *Brooks v. Harris*, *supra*; *Harshman v. Armstrong*, 43 Ind. 126; *McSweeney v. Carney*, *supra*; *Hopper v. Lucas*, *supra*; *Fisher v. Hamilton*, 49 Ind. 341; *Jones v. Levi*, *supra*.

Examining the complaint in this case, without reference to the transcript filed therewith, we find that both paragraphs thereof were sufficient, on demurrer, as each of them expressly averred that the judgment therein mentioned was duly rendered in an action wherein the court rendering the same had jurisdiction over the subject-matter of the action, and the person of the defendant thereto, and hence we must hold that

The State, *ex rel.* Wingler, *v.* McIntosh.

the court below erred in sustaining the demurrers. For the error so committed the judgment should be reversed.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellee, and the cause is remanded, with instructions to the court to overrule the demurrers to both paragraphs of the complaint, and for further proceedings.

Filed Feb. 25, 1885.

No. 12,169.

THE STATE, EX REL. WINGLER, *v.* MCINTOSH.

EXEMPTION LAW.—*Debt upon Contract.—Costs.*—Under section 703, R. S. 1881, a resident householder can claim an exemption of his property from sale on execution, or other final process from a court, only where such execution or other process is for a debt growing out of or founded upon a contract, express or implied. Costs are not a matter of contract, but they are given or withheld by statute; and where an execution is issued upon a judgment for costs, and it does not appear that such costs were even incident to any debt founded upon any contract, express or implied, the execution defendant, though a resident householder, can not claim any of his property as exempt from sale on such execution.

From the Washington Circuit Court.

S. H. Mitchell and *R. B. Mitchell*, for appellant.

S. B. Voyles and *H. Morris*, for appellee.

Howk, J.—In September, 1882, the appellant's relator, Francis A. Wingler, was the owner of certain real estate in Washington county, and one Obadiah Simpson and Samuel Nuckles were each the owner of other lands, in the same county, adjoining the relator's real estate. On September 25th, 1882, in pursuance of written notice theretofore given to such adjoining land-owners, the relator proceeded with the county surveyor to have the corners and lines of his real estate established according to law. Thereafter the said Obadiah Simpson duly appealed from the survey, so made by the county surveyor, to the circuit court of Washington county, wherein

100	430
124	528
100	430
140	142
100	430
180	475
180	477

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such appeal was docketed and tried, under the name and title of *Obadiah Simpson v. Francis A. Wingler*. Afterwards, at the May term, 1883, of the court below, the trial of such appeal by the court resulted in a finding in favor of Simpson, and, over Wingler's motion for a new trial, judgment was rendered revoking and setting aside the survey so made as aforesaid by the county surveyor, and ordering and directing a new survey to be made, for the location and establishment of the corners and lines of the relator's real estate. From this judgment Wingler appealed to this court, where, on the 14th day of February, 1884, the judgment below was affirmed, at Wingler's costs. *Wingler v. Simpson*, 93 Ind. 201.

Afterwards an execution was issued out of the court below for the costs therein taxed against Wingler in the above mentioned appealed case of *Simpson v. Wingler*, which execution was directed to the sheriff of Washington county, and came to the hands of the appellee McIntosh, as such sheriff, to be executed. By virtue of such execution the relator levied upon the aforesaid real estate of the relator, and advertised the same for sale to satisfy such writ; whereupon the relator Wingler, who was then, and before and since, a resident householder of Washington county, made out and delivered to the appellee, as such sheriff, the schedule, inventory and affidavit, of and concerning his property, required of an applicant for exemption by sections 713 and 714, R. S. 1881, and thereon demanded that his real estate aforesaid should be set apart to him by the appellee as exempt from sale on such execution. The appellee, as sheriff, refused to comply with the relator's demand, or to set apart to him the aforesaid real estate as exempt from sale on such execution.

Upon the relator's verified complaint, stating substantially the facts above recited, an alternative writ of mandate was issued in this case, requiring the appellee as sheriff to set apart to such relator the aforesaid real estate, as exempt from sale on the execution then in appellee's hands, or to show cause why he should not do so. The appellee appeared, and his

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demurrer to the complaint and his motion to quash the alternative writ of mandate were sustained by the court. The relator declined to amend or plead further, and judgment was rendered against him for appellee's costs.

Errors are assigned here by the appellant's relator which call in question the decisions of the circuit court in sustaining the demurrer to the complaint and the motion to quash the alternative writ of mandate. These errors present for our decision substantially the same questions, namely, Is the case stated by the relator, in his complaint and alternative writ, a case wherein he may lawfully claim any of his property as exempt from sale on the execution in the hands of the appellee as sheriff? Do the facts stated by the relator show that the execution in appellee's hands was "for any debt growing out of or founded upon a contract, express or implied?" Was the judgment for costs, upon which such execution issued, the relator's debt growing out of or founded upon a contract, express or implied? These questions are by no means free from difficulty, and yet it is manifest, we think, that the proper decision of the case in hand depends wholly upon the answers which must be given to the questions stated.

The exemption law of this State, in force since May 31st, 1879, provides as follows: "An amount of property not exceeding in value six hundred dollars, owned by any resident householder, shall not be liable to sale on execution or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied, after the taking effect of this act." Section 703, R. S. 1881. The same law, except as to the amount of the exempted property, had been in force since May 6th, 1853. 2 R. S. 1876, p. 353. In the early case of *State, ex rel., v. Melogue*, 9 Ind. 196, after quoting the statute, the court said: "Under the above provisions, we think property is exempt from execution only in actions upon contract." And so the statute has always been construed by this court. *Keller v. McMahan*, 77 Ind. 62; *Thompson v. Ross*, 87 Ind. 156; *Nowling v. McIntosh*, 89 Ind. 593; *Berry*

The State, *ex rel.* Winger, *v.* McIntosh.

v. Nichols, 96 Ind. 287. In the case last cited, in speaking of the complaint, the court said: "It should have averred that the judgment was rendered upon a debt growing out of contract, express or implied, for if it grew out of tort, the exemption was not allowable. * * * In the absence of a showing to the contrary, it must be presumed that the officer properly performed his duty, and that he rightly refused the exemption."

In *Church v. Hay*, 93 Ind. 323, it was substantially held that the costs recovered by the plaintiff, in a suit for tort, being an incident of the judgment for damages, are collectible on execution in the same way; the judgment is an entirety, and no property is exempt from the execution thereon, either for the damages or for the costs. If it could be correctly said, in the case at bar, that the execution in appellee's hands was for a debt founded upon or even incident to a contract, express or implied, we should have no difficulty in reaching the conclusion that the rulings of the court, of which the appellant's relator complains, were erroneous, and that he was entitled to the exemption which he demanded of the appellee. But the relator failed to show by his complaint, or in his alternative writ, that the debt for which the execution was issued grew out of, or was founded upon, or was even incident to, any contract, express or implied. The debt for which the execution issued was a debt for costs, and those costs were not shown to be an incident even of any debt growing out of or founded upon any contract, express or implied. The costs accrued, as shown in the relator's complaint and by the alternative writ, in a cause or proceeding which was purely statutory, and was not founded upon any contract of any kind, or upon any tort. Costs are not matter of contract, but they are given or withheld by statute. *Smith v. State*, 5 Ind. 541; *Dearinger v. Ridgeway*, 34 Ind. 54; *Schlicht v. State*, 56 Ind. 173; *Henderson v. State, ex rel.*, 96 Ind. 437, on page 444.

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We are of opinion, therefore, that the court committed no error in sustaining either the demurrer to the relator's complaint or the motion to quash the alternative writ.

The judgment is affirmed with costs.

Filed March 11, 1885.

No. 11,565.

STROSSER v. THE CITY OF FORT WAYNE.

MUNICIPAL CORPORATION.—Annexation of Territory.—Estoppel of Land-Owner.—A property-owner does not estop himself from contesting the validity of proceedings ordering the annexation of territory to the corporation in cases where there is no jurisdiction to make the order, by voting at municipal elections and by offering himself as a candidate for office; nor does he estop himself by unsuccessfully petitioning the common council to improve the streets.

SAME.—Jurisdiction of Common Council in Annexation Proceedings.—The common council of a city has no authority to order the annexation of contiguous territory unless it has been laid off into lots and platted, without the consent of the owners, and an order annexing territory not platted, and in cases where the owner has not consented, is void.

SAME.—Estoppel of Property-Owner.—Improvements by City.—If the property-owner for a considerable length of time acquiesces in the annexation proceedings, and, without objection, sees the city make improvements and expend large sums of money upon the faith of the validity of the proceedings, he will be estopped from impeaching the validity of the proceedings, although he may not have directly received any benefit from the improvements made by the city.

SAME.—Corporate Boundary.—Ignorance of Facts.—Estoppel.—Where public officers, having no personal interest in the matter, and acting in good faith, assume to make a change in the corporate boundaries of a city, and fail through mistake of fact to proceed in accordance with the statute, a property-owner who resides in the territory sought to be annexed, and who sees the city spend large sums of money in making public improvements on the territory annexed, may be estopped even though he did not know that the proceedings were void.

CURATIVE STATUTES.—Validity and Effect.—Curative statutes are valid, and may heal defects and irregularities in judicial proceedings; but, where the proceeding was had in a tribunal having no jurisdiction of the subject-matter, the proceeding is void, and can not be made valid by a curative statute.

100	443
139	443
100	443
137	432
100	443
142	515
100	443
144	282
100	443
148	37
150	569
152	101
152	451
154	452
152	581
100	443
160	108
100	443
161	228
100	443
108	255
108	256

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SAME.—Common Council.—Board of Commissioners.—Jurisdiction.—Where the statute confers exclusive jurisdiction upon the board of commissioners to order lands annexed to a city, the power can not be exercised by the common council, and a statute attempting to legalize an order made in such a case by the common council is inoperative and void.

From the Allen Superior Court.

N. Wyeth, for appellant.

H. Colerick, for appellee.

ELLIOTT, J.—It is not necessary to set forth with much particularity the allegations of the complaint of the appellant, for no attack is made upon it in any form. The several paragraphs of the pleading are, in all essential particulars, substantially alike, and count upon the same cause of action, which, shortly stated, is this: The appellee attempted to annex the appellant's land and that of other persons; the proceedings were absolutely void, but, notwithstanding the fact that such proceedings were void, the municipal officers did levy and collect taxes from the appellee and now retains the money so collected, although the land was not subject to taxation.

The action is by a property owner who has paid the taxes which he seeks to recover, and is not an action by a purchaser at a tax sale, so that the case is fully within the rule laid down in *City of Indianapolis v. McAvoy*, 86 Ind. 587; *Durham v. Board, etc.*, 95 Ind. 182; *Board, etc., v. Armstrong*, 91 Ind. 528.

The second paragraph of the appellee's answer expressly admits that the land of the appellant was annexed in the manner described in the complaint; that taxes were assessed and paid as charged, and then seeks to avoid the effect of these admissions by these averments: "That during said time and after the annexation proceedings and while plaintiff resided on said premises, he voted at every city election and solicited the votes from his neighbors and friends for himself as a candidate for common councilman, and petitioned the common council for improvements for the seventh ward of the

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city of Fort Wayne." We are unable to find any principle upon which this answer can be sustained.

If, as the answer admits, the proceedings for the annexation were unauthorized, the city had no right to levy or collect taxes, and unless the appellant has done something which precludes him from asserting the invalidity of the proceedings, his property rights are not affected by them. The fact that he voted at a municipal election can not have the effect to preclude him from asserting that the annexation proceedings were invalid, for that fact did not deprive the city of any substantial right nor confer upon the appellant a privilege or franchise of such legal value as to preclude him from asserting the truth respecting the annexation proceedings. Nor was the privilege of standing as a candidate for a municipal office of such value to him as to compel him to silence regarding the illegality of the attempt to annex contiguous territory, and surely his candidacy can not be treated as a thing of value to the municipality. The fact that he united in a petition for an improvement does not coerce him into silence, for the bare fact that he signed a petition neither brought him a thing of legal value, nor took from the city a thing of appreciable worth. These facts may be some evidence of acquiescence, but they are much too slight to build a defence of estoppel upon, or to sustain any defence of a kindred nature. This conclusion is so plainly correct upon general principles that it is hardly necessary to cite authorities, but there are cases fully in point against the sufficiency of the answer. *Langworthy v. City of Dubuque*, 13 Iowa, 86; *Buell v. Ball*, 20 Iowa, 282. Much stronger than the case made by the answer is that of *Greencastle Tp., etc., v. Black*, 5 Ind. 557, where the plaintiff was held not concluded although he voted for the tax he sought to have declared illegal.

The evidence shows that the common council of the city passed a resolution for the annexation of contiguous territory, but it also appears that the lots which the city attempted to annex were not platted, and that the appellant did not con-

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sent to the annexation. Under our statute, as has been repeatedly decided, the common council can not annex contiguous territory unless it is laid off into lots and platted. Such, indeed, is the express provision of the statute. R. S. 1881, sections 3195, 3196, 3197. When the land is not laid off into lots, the city must secure an order of the board of commissioners for the annexation. The common council have no jurisdiction in such cases, and an order of a court, even of the highest rank, in a case where it has no jurisdiction, is ineffective for any purpose. *Taylor v. City of Fort Wayne*, 47 Ind. 274; *City of Peru v. Bearss*, 55 Ind. 576; *Town of Cicero v. Williamson*, 91 Ind. 541; *Windsor v. McVeigh*, 93 U. S. 274. It is so plain that the common council can not exercise jurisdiction in cases where it is expressly conferred upon the board of commissioners of the county that neither argument nor authority is needed. *City of Logansport v. LaRose*, 99 Ind. 117.

The evidence does not show that the appellant ever received any substantial benefit from the annexation, nor does it show that the city incurred any expense, or was induced to change its position to its injury, on account of the attempted annexation. If it had been shown that the appellant had received any benefit from the attempted annexation, or if it had been made to appear that the city had incurred expense, or laid out money, on the faith that the annexation was valid, we should have had a very different case. But we have here a case where the city did not change its position to its injury, nor the citizen receive any substantial consideration. The case falls within the general rule thus stated by one of the text-writers: "It will be found upon an examination of the above and other cases that, wherever the rights of other parties have intervened by reason of a man's conduct or acquiescence in a state of things about which he had an election, and his conduct or acquiescence, or even laches, was based on a knowledge of the facts, he will be deemed to have made an effectual

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election; and he will not be permitted to disturb the state of things, whatever may have been his rights at first. But mere acquiescence or waiver, made without consideration, will not be binding, if a change of purpose do not affect the rights of others." Bigelow Est. (2d ed.) 508.

There may be a consideration sufficient to bind the person under a duty to act although he receives no direct benefit. A consideration may exist although the party against whom a right is urged may have received nothing of value from the other party. It is sufficient if there be loss or injury to the party acting. *Shade v. Creviston*, 93 Ind. 591, see p. 595. This principle is illustrated by the cases which hold that where a land-owner licenses another to do an act, and the licensee, upon the faith of the privilege granted, expends large sums of money, the licensor can not revoke the license. *Rogers v. Cox*, 96 Ind. 157, *vide* authorities p. 158; *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; *Miller v. State*, 39 Ind. 267; *Snowden v. Wilas*, 19 Ind. 10. It is further illustrated in cases of boundaries, for, in such cases, long acquiescence in a line accepted as the boundary will preclude the real owner of the soil from reclaiming it and changing the boundary, if the other party has made valuable improvements on the faith that the boundary was the true one. *McCormick v. Barnum*, 10 Wend. 104; *Chicago, etc., R. W. Co. v. People*, 91 Ill. 251; *Diehl v. Zanger*, 39 Mich. 601; *Hagey v. Detweiler*, 35 Pa. St. 409; *Columbet v. Pacheco*, 48 Cal. 395; *Meyers v. Johnson*, 15 Ind. 261; *Wingler v. Simpson*, 93 Ind. 201; *Pitcher v. Dove*, 99 Ind. 175. It is true that the mistake which caused the invalidity of the annexation proceedings was one of fact. *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *City of Indianapolis v. McAvoy, supra*; *Town of Cicero v. Williamson, supra*. But an acquiescence in a mistake, and knowledge that large expenditures have been made in ignorance of the mistake, may preclude a party from relief against it. The general rule undeniably is that a party is not estopped unless he

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has knowledge of all the material facts, but there are many exceptions to this general rule. Pomeroy says: "The rule has sometimes been stated, as though it were universal, that an actual knowledge of the truth is always indispensable. It is, however, subject to so many restrictions and limitations, as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence. It does not apply where the party, although ignorant or mistaken as to the real facts, was in such a position that he ought to have known them, so that knowledge will be imputed to him. In such case, ignorance, or mistake will not prevent an estoppel. Nor does the rule apply to a party who has not simply acquiesced, but who has actively interfered by acts or words, and whose affirmative conduct has thus misled another. Finally, the rule does not apply, even in cases of mere acquiescence, when the ignorance of the real facts was occasioned by culpable negligence." 2 Pomeroy Eq. Juris., sec. 809. We think that where the question is as to the corporate boundary, and where the authorities who attempt to extend the boundaries act in a public capacity, and in good faith assume to make the change in the corporate boundaries in accordance with the provisions of the law upon the subject, and fail in doing this by mistaking a fact, the corporation may successfully assert the efficacy of the change against a taxpayer who has lived in the territory sought to be annexed, who has for a considerable length of time acquiesced in the validity of such proceedings, and who has, without objection, seen large sums of money expended on the faith that such annexation proceedings were valid.

There are many reasons why a different rule should apply to the acts of municipal authorities engaged in the performance of purely public duties from the one which obtains in cases where the controversy arises out of matters of private business between individual citizens. The municipal authorities in such a case exercise delegated governmental functions, for municipal corporations are instrumentalities of gov-

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ernment. The officers of the corporation acting in public matters represent the inhabitants of the locality; for the inhabitants of the locality, and not the officers, constitute the corporation. *City of Valparaiso v. Gardner*, 97 Ind. 1. The acts of such officers are public, and one who is interested in the subject over which their acts extend is bound to take notice of such of their acts and proceedings as appear of record. *Johnson v. Common Council of Indianapolis*, 16 Ind. 227; *Newman v. Sylvester*, 42 Ind. 106; *City of Madison v. Smith*, 83 Ind. 502; *Swift v. City of Williamsburgh*, 24 Barb. 427. As the acts are public and are of record, a taxpayer is negligent if he acquiesces for a long period of time, without inquiry or objection, in the acts of the municipal officers. If one has means of knowledge and is put upon inquiry, he must exercise diligence; if he does not he will be deemed negligent. The inhabitants of the municipal corporation as it existed before the annexation, as well as those living in the territory which it was attempted to annex, are all interested in the annexation. Individual citizens may acquire rights in the highways, and while the municipal corporation in some measure represents these individual rights, still the citizens have rights distinct from those vested in the corporation. If a taxpayer were permitted to long acquiesce in the order of annexation and then secure its overthrow, great confusion would ensue and much injustice be often done. High considerations of public policy and of justice require that a taxpayer who is notified that a public corporation claims to have extended its limits so as to take in his property should act with promptness and proceed with diligence, if he would resist the attempted annexation. The difference between public officers, although acting for a public corporation, and private individuals acting for themselves in the promotion of their own private interests, is recognized in various forms. Public corporations as to purely public rights are not within the ordinary statute of limitation. 2 Dillon Mun. Cor. (3d

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ed.), sec. 675. A right to a public street can not, as against a public corporation, be acquired by possession. *Sims v. City of Frankfort*, 79 Ind. 446.

A municipal corporation, as the representative of the public, may acquire a direct estate in land by dedication, although there be no express grant by the owner, and the use may not have been long continued. *Faust v. City of Huntington*, 91 Ind. 493; *Carr v. Kolb*, 99 Ind. 53. The exercise of corporate authority over a territory under color of legal proceedings, with knowledge on the part of the public for twenty years, is held to be conclusive evidence of a charter. *Worley v. Harris*, 82 Ind. 493; *Bow v. Allentown*, 34 N. H. 351; *Bassett v. Porter*, 4 Cush. 487. It would seem to follow from these principles that the exercise of authority for a much shorter period, with the knowledge of the public and the consent of the landowner, ought, in a case where the corporation would otherwise suffer great loss, be held to conclude him from denying the legality of the annexation proceedings. In the case of *Milne v. Mayor*, 7 La. (N. S.) 47, it was held that where the citizens of a locality are for a series of years regarded as corporators, and reap the benefits arising from the municipal ordinances and improvements, they will be treated as such and held to the liabilities of corporators. In *People v. Farnham*, 35 Ill. 562, it is held that long acquiescence and acceptance of corporate benefits are sufficient to justify the courts in holding that the taxpayer is an inhabitant of the municipality. The case of *Hamilton v. McNeil*, 13 Grat. 389, declares and enforces the distinction between public corporations, and holds a doctrine similar to that declared in the preceding case. The conclusion to which these authorities logically lead is, that acquiescence may constitute a citizen a corporator, and where it is long continued, and benefits of a substantial character are received by him as a corporator, the courts will treat him as such, and not permit him to withdraw the election evidenced by his acquiescence. This result is in full harmony with the

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fundamental maxim that he who derives the benefit must sustain the burden. Broom Legal Max. 705, side p. 706.

There are some other matters which it is important to consider on this branch of the case. The citizen of a territory which is assumed to be annexed to a municipal corporation is relieved from some burdens incident to a suburban residence. The burdens with respect to highways are essentially different, and from these he is relieved. He can not be subjected to both burdens, and in treating the annexation proceedings as valid, and receiving the benefits of a corporator, he makes his election, and where the municipality has expended money in the belief that the annexation was valid, he must be held to it. There can not be two public corporations exercising like powers within the same territory, though there may be two different governmental bodies, as a city and a county. This was said in *Taylor v. City of Fort Wayne*, *supra*, "to be a self evident proposition." Grant Corp. 18; *King v. Pasmore*, 3 T. R. 199, 243; 1 Dill. Mun. Corp. (3d ed.), sec. 184.

The common council of a city do not constitute the municipality, but they are the agents of the inhabitants so long as they act within the scope of the authority conferred upon them by the law. *City of Valparaiso v. Gardner*, *supra*; Grant Corp. 357. They are not the agents of persons living outside of the corporate limits, but when they assume to annex the lands owned by such persons, and afterwards assume to exercise corporate authority over the land and its owner, then they do assume to be his representative. It is a familiar elementary rule, that where one assumes to act as another's agent, and the person for whom he assumes to act receives and enjoys substantial benefit from the acts of the professed agent, he will be deemed to have ratified the agent's act, and will be bound to the same extent as if he had originally invested the agent with the authority assumed. We think this principle applies to a citizen who, with means of knowledge within his reach, acquiesces in the acts of the common council and receives substantial benefits from those acts,

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although there was no precedent authority, but an assumption of authority under color of legal proceedings. This is strictly in consonance with the general doctrine of election. Bigelow says: "A party can not either in the course of litigation or in dealings *in pais* occupy inconsistent positions; and where one has an election between several inconsistent courses of action he will be confined to that which he first adopts. Any decisive act of the party done with knowledge of his rights and of the facts determines his election and works an estoppel." Bigelow Estop. (3d ed.) 562. A strong illustration is furnished by the case of *Daniels v. Tearney*, 102 U. S. 415, where it was held that one who had accepted benefits under a statute of Virginia passed under and in aid of the ordinance of secession, could not repudiate his act; although both the ordinance and the statute were unconstitutional and void. In *Ferguson v. Landran*, 5 Bush (Ky.) 230, the court said: "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent, or subsequently sanctioned by him, or from which he derives an interest and consideration, and then keep the consideration and repudiate the statute." Whether it be proper to class such a case as the present under the doctrine of estoppel, or of election, which Mr. Bigelow thinks is a different doctrine (Bigelow Estop., 3d ed., 562, n.), or of ratification, may be a question of difficulty, but, in whatever class it is placed, it is clear that where the taxpayer receives substantial benefits and acquiesces in the action of the public authorities for a considerable length of time, he can not escape the burdens incident to the position which has brought him the benefits. If we assign the case to the last of the classes mentioned, the rights of the municipal corporation are, perhaps, more certain and clear, for, as the author to whom we have referred says, "A man may bind himself by ratifying an act in a way that would not bind him if the doctrine of estoppel were to be applied." Bigelow Estop. (3d ed.) 580.

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In the case before us, both the answer and the evidence have a material infirmity. It does not appear in either that the taxpayer has reaped any substantial benefits from the attempted annexation, nor that it had been generally acquiesced in by the people of the district attempted to be brought into the city, nor does it appear that the city has incurred expense on the faith of the annexation and acquiescence of the citizen. Had these elements been fully developed by the pleadings or evidence, our judgment would be that the appellant could not succeed. We think that as the consent of the property owners in the first instance would have made the proceeding valid, subsequent conduct evidencing such consent, and leading the city to expend money upon the faith that such consent had been given, would preclude them from denying that they had elected to become corporators.

Another question remains, the effect of a curative act adopted in 1879. The appellee's counsel do not discuss this question, but it is discussed by the appellant. One of the positions assumed is that the act is unconstitutional because it is special legislation, and we are referred to the constitutional provisions upon the subject, and to *State, ex rel., v. City of Cincinnati*, 20 Ohio St. 18; *Ex Parte Pritz*, 9 Iowa, 30; *Von Phul v. Hammer*, 29 Iowa, 222; *City of Wyandotte v. Wood*, 5 Kan. 603; *Atchison v. Bartholow*, 4 Kan. 124; *San Francisco v. S. V. W. W.*, 48 Cal. 493, to which may be added *Independent School District, etc., v. City of Burlington*, 60 Iowa, 500. We decline to decide the question without a fuller argument, as it is one of very great importance and much difficulty, and for the further reason that the decision of this question is not essential to the determination of this cause.

We have seen that at the time the common council assumed to annex the adjacent territory, it had no jurisdiction at all over the subject-matter, for exclusive jurisdiction was vested in the board of commissioners of the county. It was an attempt by one tribunal to exercise jurisdiction over a subject-matter over which another tribunal had exclusive jurisdic-

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tion. There was not simply a defect or irregularity in the proceedings, but there was an absolute want of jurisdiction of the subject-matter, for it was an attempt to exercise a jurisdiction given by statute to an entirely different tribunal. The law upon this subject is thus stated by Judge Cooley, who, in speaking of the power to legalize tax proceedings, says: "One very precise limit to the power to cure these proceedings is this: They can not be cured when there was a lack of jurisdiction to take them. This is a rule applicable to every species of legal proceedings. Curative laws may heal irregularities in action, but they can not cure a want of authority to act at all." *Cooley Taxation*, 227. In another work the same author says: "And if persons or property should be assessed for taxation in a district which did not include them, not only would the assessment be invalid, but a healing statute would be ineffectual to charge them with the burden. In such a case there would be a fatal want of jurisdiction; and even in judicial proceedings, if there was originally a failure of jurisdiction, no subsequent law can confer it." *Cooley Const. Lim.* (5th ed.) 472, side p. 383. Mr. Pomeroy, in an elaborate note to the text of Mr. Sedgwick, examines the cases thoroughly and concludes that "It is a general principle, that when an act, proceeding, or transaction is void, and not merely voidable on account of some formal defect, it can not be cured by legislative action; whatever discrepancy in the decided cases exists—and there is much discrepancy—seems to result from a disagreement as to what constitutes an essential defect, rather than from any disagreement as to the principle itself." *Sedg. Stat. Cons.* (2d ed.) 143.

The general principle stated by these writers is affirmed and enforced in a very great number of cases, and is so firmly settled that the citation of cases is unnecessary, but it will, perhaps, be profitable, in view of the importance of the question, to refer to some of the decisions having a direct bearing upon the phase of the question presented by the case under examina-

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tion. In the case of *Commissioners, etc., v. Carter*, 2 Kan. 115, it was held that the acts of a board of commissioners in a matter beyond their jurisdiction could not be validated by a subsequent statute; and in a later decision this principle was applied to a case where the citizen and his property were brought into the municipal corporation by an ordinance of the city, and a statute was subsequently passed legalizing the proceedings of the common council. *Atchison, etc., R. R. Co. v. Maquillin*, 12 Kan. 301. It was said in the course of the opinion in that case: "Both the annexation of said property, and the taxing of it, were void for the want of jurisdiction over the subject-matter thereof. Retrospective statutes of a remedial nature, curing the defective execution of some power really possessed by the person, tribunal, or officer attempting to exercise it, have often been held valid. But a retrospective statute attempting to create a power, or to cure a defect of jurisdiction, we believe has never been held valid." *Hart v. Henderson*, 17 Mich. 218, was a case involving the validity of a tax, and it was said by COOLEY, C. J., in delivering the opinion of the court: "Curative statutes may cover any mere irregularity in the course of proceeding for the enforcement of a lawful demand; but they can never cure a want of jurisdiction, either in tax proceedings or those of any other description." The question in *Hallo v. Helmer*, 12 Neb. 87, was as to the legality of a tax and the validity of a curative statute, and it was said: "In an able work on taxation it is stated as a general rule that defects in tax proceedings 'can not be cured where there was a lack of jurisdiction to take them.' Cooley Taxation, 227. The ordinance in question having been passed without authority, and in defiance of the provisions in the act of incorporation above referred to, is within this rule." The case of *People v. Goldtree*, 44 Cal. 323, decides that "the Legislature possesses the power to pass curative acts, by which the various acts and proceedings of the officers and board charged with the levying and assessing of

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taxes, are rendered valid and legal, notwithstanding that irregularities and errors have intervened." But where the officer or tribunal had no power or jurisdiction, the act is void, and subsequent legislation can not cure the defect.

The right to notice is a fundamental one, and it is a rule of wide application, that in order to take from a citizen any rights, or impose upon him any burdens, notice of some kind must be given him. *Wright v. Wilson*, 95 Ind. 408; *Campbell v. Dwiggins*, 83 Ind. 473; *Tyler v. State*, 83 Ind. 563; *Cooley Const. Lim.* (5th ed.) 615. In this case, however, we are not required to decide whether a statute authorizing the annexation of agricultural lands, or lands not platted, would or would not be constitutional if it made no provision for notice. We now refer to this general principle only for the purpose of showing that where notice is required by the statute under which the proceedings are had, it is a jurisdictional requisite and its absence can not be supplied by a subsequent curative act. Notice is nearly always a jurisdictional question. When the right to entertain jurisdiction of the subject-matter depends upon notice, a curative statute can not make good proceedings taken without any notice at all. *Marsh v. Chesnut*, 14 Ill. 223; *Billings v. Detten*, 15 Ill. 218; *Albany City Nat'l Bank v. Maher*, 20 Blatch. 341; *State v. City of Plainfield*, 38 N. J. L. 95; *Cooley Tax*. 227. In speaking of want of notice the court, in the case last cited, said: "This error being fundamental, annulling the ordinance for want of jurisdiction, by competent notice of the persons affected, can not be remedied by subsequent legislation." In the case before us, notice was required by the statute where the lands were not platted, and the action of the common council was, therefore, not only taken over a subject committed to the jurisdiction of the board of commissioners, but it was also taken without notice to the citizens. The effect of this course was to deprive the citizen of the notice provided by statute, and this we think was an essential jurisdictional defect which a curative statute could not remedy.

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There are many cases in which a curative statute will be deemed valid. *Kelly v. State, ex rel.*, 92 Ind. 236; *Muncie Nat'l Bank v. Miller*, 91 Ind. 441. But where there is a total lack of jurisdiction of the subject-matter, the rule laid down in the cases cited does not apply. In the case last cited, the defendant had entered a waiver of service of summons, and it was held that the Legislature had power to validate the judgment rendered against him. The decision falls fully within the rule that an act done by the party in a legal proceeding, but defectively or irregularly executed, may be validated by a subsequent statute. The decision is far from reaching the present case. Had there been no notice at all in the case cited, it would then have been in point, but there was notice, and it was accepted by the party as sufficient, although it was in reality defective.

The question in this case is, not as to the power of the Legislature over a public corporation, but as to its power over the rights of the citizen. The question is not whether the curative act of 1879 is valid so far as it affects the city, but whether it can change the substantial rights of a private citizen. That act can not be allowed to take from the citizens rights vested in them prior to its passage, and can not, therefore, be deemed to validate such a proceeding as that taken by the city in this case. Irregularities and defects in annexation proceedings it may remedy, but it can not make valid an order of annexation made by one tribunal in a case where another had exclusive jurisdiction and where notice to the property owners was required.

Judgment reversed.

ZOLLARS, C. J., did not participate in the decision of this case.

Filed Feb. 25, 1885.

Stone *et al.* v. Kopka.

No. 11,886.

STONE ET AL. v. KOPKA.

TRESPASS.—*Stock Running at Large.*—*Fencing.*—In the absence of an order by the board of county commissioners permitting cattle to run at large, the owner is liable for damages caused by any trespass they may commit while so running at large, without reference to the quality of fencing through which they may pass, or whether they are breachy or accustomed to doing mischief.

From the Pulaski Circuit Court.

J. C. Nye and J. Nye, for appellants.

N. L. Agnew and — *Borders*, for appellee.

FRANKLIN, C.—Appellee sued appellants for permitting their cattle, running at large, to trespass upon appellee's premises. An issue was formed by a denial. There was a trial by a jury, a verdict returned for the plaintiff for \$15, judgment was rendered upon the verdict, and a motion for a new trial was overruled.

The only error assigned is the overruling of the motion for a new trial. The reasons stated for a new trial are, the verdict is not sustained by the evidence, and is contrary to law, and error of the court in refusing to admit certain testimony.

The evidence sustains the verdict, and it is not contrary to law.

Appellants on the trial offered to prove by one Jones that the said cattle of defendants were not, at the time of said trespass, "breachy or accustomed to do mischief, such as that charged in the complaint."

The issue was whether the cattle committed the trespass, and not whether they were breachy or accustomed to do mischief. All breachy stock has a beginning to be breachy, and the fact that this stock had not been breachy theretofore, furnished no evidence that they did not commit the breach alleged, as against undisputed evidence that they did commit the alleged trespass. Good character is no defence against positive, undisputed evidence of guilt. But while the first

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and second specifications of error are not insisted upon by appellants in their brief, under the third specification it is claimed that said evidence was admissible, for the reason that it tended to show that appellee's fence, where the cattle entered his premises, was bad, and not sufficient to turn stock. As to whether the fence was bad was an immaterial issue, not embraced in the pleadings.

There is nothing in the pleadings or evidence showing that the board of commissioners of said county had passed any order allowing such animals to run at large in that vicinity, as is provided for by the 2637th section, R. S. 1881. In the absence of such order, every owner is required to fence in his own stock, and he is not bound to fence out other stock. *Indianapolis, etc., R. R. Co. v. Harter*, 38 Ind. 557; *Jeffersonville, etc., R. R. Co. v. Huber*, 42 Ind. 173; *Jeffersonville, etc., R. R. Co. v. Adams*, 43 Ind. 402; *Pittsburgh, etc., R. W. Co. v. Stuart*, 71 Ind. 500.

It is only in cases where the county board has entered of record an order allowing such animals to run at large that the plaintiff, for a trespass committed by them, is required to prove that his fence through which they entered was such as good husbandmen generally keep. *Hinshaw v. Gilpin*, 64 Ind. 116. In the absence of such an order, the owner of animals, permitting them to run at large, is liable for the damages caused by any trespass that they may commit while so running at large, without reference to what kind of a fence they may have broken through, or whether they passed through any fence at all. Hence, in this case, the quality of the fence could make no difference, and it was immaterial whether the cattle were breachy or not. There was no error in excluding this evidence, nor in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Feb. 12, 1885.

Day v. Day.

No. 10,723.

DAY v. DAY.

GIFT.—Decedents' Estates.—Assets.—Widow.—Heirs.—Distribution.—Agreed Case.—In an agreed statement of facts, it was made to appear that D., in his lifetime, before he married the plaintiff, his second wife, donated and gave to a school association, to aid in establishing the same, a certain sum of money. After D.'s death and the final settlement of his estate, the trustees of such association sold its property and out of the proceeds paid said sum to the defendant, as the only child and heir of D. by a former marriage. D. had no children by said second wife. Upon these facts the court was asked to determine the rights of the parties. *Held*, that as the facts show an absolute gift to the association by D., its payment of the money to the defendant was voluntary merely, and such money can not be treated as assets of D.'s estate, or as property belonging to him, and that such defendant can not be required to make distribution of it among the heirs.

From the Morgan Circuit Court.

W. R. Harrison and *W. E. McCord*, for appellant.

G. W. Grubbs, for appellee.

COLERICK, C.—This action was submitted to, and decided by, the court below upon the following agreed statement of facts :

"Whereas said defendant (the appellant) as son and heir of John Day, deceased, received certain money of the board of trustees of the Mooresville High School Association, and claims to be the legal holder and owner thereof, and whereas said plaintiff claims to be entitled to a part, to wit, one-half thereof, as widow of said deceased: Now, to settle the question as to the rights of said parties in and to said money, it is agreed that said question shall be submitted upon proper pleadings, or agreed statement of the facts in said matter, to the said court for its determination thereof, at the earliest practicable time, and as far as can be without costs to said parties. The facts in relation to said money we agree are as follows:

"1st. Said John Day, now deceased, in his lifetime, and

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before he married plaintiff Hannah, donated and gave to said Mooresville High School Association, to aid in establishing the same, building house, etc., the sum of one hundred and fifty dollars.

"2d. After the death of said John Day the trustees of said High School Association sold the property of said association to the school town of Mooresville, and of the proceeds of said sale, after the death of said John Day, paid to the defendant, as the only child and heir of said John Day, \$112.50, and will yet of the proceeds of said sale pay to him \$37.50, or about that.

"3d. Said sale of said property by said trustees, and payment to said defendant, were made after the final settlement of the estate of said John Day, deceased.

"4th. Said plaintiff was second wife of said deceased, and had no children by deceased.

"5th. Said defendant is the only child and heir of the former marriage of said deceased."

This statement was accompanied by an affidavit, in which it was stated that the controversy between the parties was real, and submitted to the court by them in good faith to determine their rights. Upon the facts above recited the court, as a conclusion of law thereon, declared that the appellant and appellee were each entitled to one-half of the money in controversy, to which conclusion of law the appellant excepted, and thereupon judgment was rendered against him, in favor of the appellee, for one-half of said sum of money, to which judgment he also excepted. The errors assigned present a single question for our consideration, Did the court err in its conclusion of law upon the facts above set forth?

It is settled by the decisions of this court that the agreed statement of facts in a case like this, under the statute by which it is governed—R. S. 1881, section 553—takes the place of the pleadings in the case. *Sharpe v. Sharpe*, 27 Ind. 507; *Manchester v. Dodge*, 57 Ind. 584; *Warrick, etc., Ass'n v. Hougland*, 90 Ind. 115. And judgment must be rendered

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thereon in favor of the party entitled thereto, taking the facts therein recited to be true, but if the facts so recited fail to show a cause of action in the party in whose favor the judgment is rendered by the trial court, it will not be upheld by this court. See *Works Pr.*, sections 813 and 997; *Gregory v. Perdue*, 29 Ind. 66. Nor will this court indulge in any presumptions in favor of the judgment of the court below, because this court has the same means as that court had of reaching a correct conclusion of law upon the agreed facts of the case, which it will consider the same as if it were trying the case originally. *Indianapolis, etc., R. R. Co. v. Kinney*, 8 Ind. 402; *Hannum v. State*, 38 Ind. 32; *Warrick, etc., Ass'n v. Hougland*, *supra*.

Applying to this case the rules of practice announced and declared in the cases above cited, the judgment of the court below must be reversed, as the facts recited in the agreed statement of facts fail to show a cause of action in the appellee. It is not stated therein that the deceased was a stockholder or member of the Mooresville High School Association, and by reason thereof held an interest in the property of the association that was sold to the school town of Mooresville, or in the money realized from its sale, or that the association at any time occupied as to him the relation of trustee, nor is any fact or facts stated which show or tend to show that any liability, of any nature, present or future, was at any time or in any manner incurred by the association to the deceased for the money which it received from him. On the contrary, it clearly appears by the facts stated that the money was received by the association from the deceased as an absolute gift. If so, no legal obligation to return the money or account for it was created against or imposed upon the association, and its act in subsequently returning the money to the appellant was voluntary on its part, and not performed for the purpose of relieving or discharging itself of any legal obligation resting upon it to do so, as none existed. According to the facts agreed upon by the parties, as above set

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forth, the money received by the appellant can not be treated or regarded as assets of the estate of the decedent, or as property belonging to him, and, therefore, the appellant can not be required to make distribution of it among the heirs of the decedent. It follows, from the views above expressed, that in our opinion the court below erred in its conclusion of law, and for that reason the judgment ought to be reversed.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellee, and the cause is remanded with instructions to the court to render judgment for the appellant.

Filed Feb. 14, 1885.

No. 11,074.

HUNTER ET AL. v. EICHEL ET AL.

TOWN PLAT.—*Location.*—*Evidence.*—An explanatory note upon a town plat, which is inconsistent with all other things which appear by the plat, including courses and distances marked thereon, will not be held to control the other facts thus appearing when a question of the location of a lot is in dispute.

SURVEY.—*Effect as Evidence.*—A survey by the county surveyor, made as provided by statute, conclusively binds the parties thereto unless an appeal be taken.

From the Vanderburgh Circuit Court.

C. Denby, D. B. Kumler and R. A. Hill, for appellants.

A. Gilchrist, C. H. Butterfield, R. D. Richardson and J. T. Walker, for appellees.

BEST, C.—The appellee Laura Eichel brought this action against the appellants to quiet her title to a certain parcel of ground described as lot seven (7), in Lilleston and Larabee's addition to the city of Evansville.

Issues were formed, a trial had, finding made and judgment rendered for the appellee. A motion for a new trial, on the ground that the finding was not sustained by the evi-

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dence, and that the court improperly excluded certain testimony, was overruled, and this ruling is assigned as error.

On the 25th day of April, 1842, Samuel G. Lilleston, Huntington Larabee and Willard Carpenter owned about an acre of land in a square form immediately north and abutting upon the north terminus of Main street, in the city of Evansville. This land was divided by the Princeton road which commenced at the north terminus of Main street, distant from the southwest corner of said land about eighty feet, and runs in a northeast direction, its course being nineteen and one-half degrees east of north. The land on the west side of this road was platted into fourteen lots, numbered from one to fourteen inclusive, beginning at the north, and this division was designated as Lilleston and Larabee's addition to the city of Evansville. The north and south lines of these lots, as they appear upon the plat, are at right angles with the road, and the east end of the north line of lot fourteen is at the south line of said land. The east end of this lot, as thus marked, has no frontage, but simply forms a point on the road. The width of the rear end of this lot is twenty-three feet three inches and the north line is eighty three feet and eight inches in length. The south line of lot one forms an acute angle with the north line of said land, and the front of said lot is forty-six feet and six inches in width. The plat contains this explanatory statement: "All the lots except No. 1 are twenty-five feet front."

The appellee has an undisputed title to lot seven (7), and the appellant Robert H. Hunter a like title to lot eight (8). The real dispute is whether the ground in controversy is lot seven or lot eight, and this turns upon the question whether lot fourteen has a frontage of twenty-five feet upon the Princeton road. If it has, all the other lots except lot one are twenty-five feet north of where they appear to be, and the lot marked seven is really lot eight. If lot fourteen has no frontage upon the Princeton road, the lot in dispute is lot seven and belongs to the appellee.

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The solution of this question depends upon the proper construction of the plat. The appellants contend that the explanatory note controls; while the appellee contends that the plat controls, and we think the appellee is correct. The shape of lot fourteen upon the map, the point where its north line is marked, the length of such line, the width of the rear end, and the size and front of lot one, are utterly inconsistent with the notion that lot fourteen has a frontage of twenty-five feet upon the Princeton road. If it has such frontage, a mistake was made in placing the lines of all the lots twenty-five feet south of where they should have been placed, a mistake was made as to the width of the rear end of lot fourteen, a like mistake was made as to the front of lot one, and a mistake was made in dividing lot fourteen into parcels, and renumbering them lots thirteen and fourteen, as well as in renumbering all the other lots except one. A construction that contradicts so many explicit and consistent parts of this plat should not be adopted unless the language of the explanatory note imperatively requires it. This note does not. Its language is, "All the lots except No. 1 are twenty-five feet front." This language, it is true, is broad enough to embrace lot fourteen, but as it can not do this without conflicting with a half dozen other portions of the plat, and as lot fourteen is not mentioned, the language must be deemed to apply to all lots fronting on the Princeton road.

In addition to this view of the case, we think the evidence established the fact that this addition had been surveyed by the county surveyor in 1864, and that the northeast corner of lot fourteen was then established on the south line of said land in accordance with the plat. As the appellant was a party to that survey, and the same remains in force, he is conclusively bound by it. *Herbst v. Smith*, 74 Ind. 44; *Grover v. Paddock*, 84 Ind. 244.

It is further insisted that the court erred in refusing to allow the appellants to prove that lot fourteen had always been

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conveyed by its number, and that the original proprietors and their grantees, down to and including the present owner, had always occupied a strip of ground as lot fourteen, having a frontage of twenty-five feet on the Princeton road. The fact that the lot had always been conveyed by its number had no tendency whatever to show its width, and the record fails to show that the appellants offered to prove that it had been occupied as claimed. There was, therefore, no error in this ruling.

For these reasons we think the motion for a new trial was properly overruled, and that the judgment should be affirmed.

PER CURIAM.—It is therefore ordered that the judgment be and it is hereby affirmed, at the appellants' costs.

Filed Feb. 20, 1885.

No. 11,732.

JOHNSON ET AL. v. GWINN ET AL.

CONTRACT.—Consideration.—Restraint of Trade.—Damages.—Parties.—Pleading.—G. & G., as partners, owned and operated a livery stable in the town of R., as did H. and also J. Bros. The last named sold for merely the value thereof the personal property used in the business, a part to G. & G. and the remainder to H., but did not sell or lease the stable, and, in consideration of the purchase, made a written contract with them, agreeing not to engage in the business in the stable of J. Bros., nor to permit others to do so for a period of five years, and that \$2,500 should be paid as liquidated damages for breach of the contract. There was a breach by act of one of the sellers, but H. having quit the business refused to join G. & G. as plaintiffs, and therefore they made him a defendant.

Held, that the written contract was upon sufficient consideration, and was valid.

Held, also, that it was unnecessary to allege special damages, the sum fixed by the contract being liquidated damages, and not a penalty.

Held, also, that H., having refused to join as plaintiff, was properly made a defendant under section 269, R. S. 1881.

Held, also, that G. & G. could sue alone and recover the whole liquidated damages.

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Held, also, that both defendants were liable for a breach of the contract by the act of one.

PRACTICE.—Signing Instructions.—Supreme Court.—There is no error in refusing instructions which are not signed by the party or his counsel, nor will the Supreme Court consider a refusal in any case unless all the instructions given are in the record.

SAME.—Examination of Witness.—Where a witness is asked as to a lost instrument, about which he has been testifying, "Is that all you remember of the contents of the instrument?" it is not error upon his request to read to him his testimony already given.

HARMLESS ERROR.—Evidence.—The refusal to permit a defendant to prove the truth of a necessary averment in the plaintiff's complaint is a harmless error.

From the Rush Circuit Court.

W. A. Cullen, B. L. Smith and W. J. Henley, for appellants.
J. D. Miller, F. E. Gavin, J. Q. Thomas, J. J. Spann, C. Cambern and T. J. Newkirk, for appellees.

BLACK, C.—This was an action brought by James M. Gwinn and John A. Gray against Joseph T. Johnson, William F. Johnson and Alvin B. Hinchman, the complaint being in three paragraphs.

One paragraph alleged, in substance, that in July, 1881, the plaintiffs, under the firm name of Gwinn & Gray, were engaged in the town of Rushville in the business of keeping a livery and feed stable; that at the same time the defendant Hinchman was engaged in said town in the same business, on his own account; that the other defendants, said Johnsons, were engaged at the same time in the same business, as partners, under the firm name of Johnson Bros., in said town, at a valuable public stand in a central location, near a leading hotel, and were doing a large and lucrative business; that on the 21st of July, 1881, the plaintiffs and said Hinchman purchased of said Johnson Bros. the buggies, sleighs, harness and other articles used by said Johnson Bros. in carrying on said business, and the good-will of said business, for the sum of \$1,850, and then gave their promissory notes to said Johnson Bros. for said amount, which notes were paid at their ma-

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turity, before the commencement of this suit; that at the time of said sale, and as a part of the transaction, and in consideration of said purchase, said Johnson Bros. executed to said purchasers a written agreement, which, before the commencement of this action, was lost, without the fault of the plaintiffs, which was, in substance, as follows:

"This agreement between Johnson Bros., and Gwinn & Gray and Alvin B. Hinchman, witnesseth, that said Johnson Bros. have sold to said Gwinn & Gray and Hinchman their livery stable stock, consisting of buggies, sleighs, harness, etc., and the good-will of said stable and concern, for the sum of \$1,850; and, in consideration of said sale and purchase by said parties, said Johnson Bros. on their part agree not to start or run a livery stable in the property now known as the Johnson livery stable, on the east side of Morgan street, in Rushville, Indiana, or permit said property to be used for such purpose, during the term of their lease of said stable, the same being five years from the 1st day of January, 1881; and in case they should do so, or in any way violate this agreement, the said Johnson Bros. agree to forfeit and pay to said Gwinn & Gray and Hinchman the sum of \$2,500 as liquidated damages for any breach of said agreement.

(Signed) "JOHNSON BROS."

It was further alleged that the plaintiffs and Hinchman fully performed the contract on their part; that said Johnson Bros. failed to comply with said agreement on their part, and, in disregard thereof, during the term of their lease, on the 1st of May, 1883, violated said agreement by permitting Joseph T. Johnson to put into said property a valuable livery stock, and by entering into at said stand, and continuing to do, a general livery business, in the hiring of horses, carriages and buggies to the public, and in feeding and selling horses, and thereby running a rival livery stable business, in rivalry of the plaintiffs; that said Hinchman refused to join in this suit as a party plaintiff, and, therefore, he was made a de-

fendant, to answer as to his interest. Wherefore, etc. Another paragraph was, in effect, like that above in substance set out.

In another paragraph, the third, the contract set out made no mention of the good-will of the business, and it recited that said Johnson Bros. agreed not to engage in the livery business in the stand where they then were, as long as their lease lasted on the same, or as long as Gwinn & Gray and Alvin B. Hinchman were engaged in the livery business, and that in case of the violation of any of the conditions of the contract, said Johnson Bros. agreed to forfeit the sum of \$2,500. It was alleged in this paragraph that the plaintiffs had been engaged in said business in said town continuously since the execution of said contract, and that said Johnson Bros., in violation of said agreement, during the continuance of their lease on the premises mentioned in said contract, on the 1st of May, 1883, put a valuable livery stock into said stable and engaged in the livery business at said stand, and had continuously thereafter engaged in said business at said stand, in opposition to and rivalry of the plaintiffs.

The defendant Hinchman answered separately that he was engaged in the livery business at the time spoken of in the complaint, and was a party to said contract sued on, and that since said time he had sold his said livery business to one Anthony Cline, "and now claims no interest in said cause of action."

The Johnsons jointly demurred to each paragraph of the complaint, and the demurrer was overruled. They jointly answered by a general denial and by a number of special paragraphs, a demurrer to which, filed by the plaintiffs, was sustained. The Johnsons also filed two paragraphs of cross complaint alleging mistakes in the drafting of said contract, and asking the reformation thereof. To these the plaintiffs filed a denial. A jury returned a verdict for the plaintiffs, assessing their damages at \$2,500. The Johnsons made a motion for a new trial, which was overruled, and judgment was rendered on the verdict. The defendants Johnson and Johnson have appealed, and have jointly assigned errors.

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Some of the alleged errors are such as could only be assigned by one of the appellants separately. We will notice only the alleged errors properly assigned jointly. *Hinkle v. Shelley, ante*, p. 88. These relate to the rulings upon the joint demurrer to the complaint, the demurrer to the joint answers, and the motion for a new trial.

The objections urged against the complaint relate to the question of the sufficiency of the facts stated, and may be disposed of in connection with the questions involved in the ruling upon the demurrer to the answer. The only paragraphs of answer discussed by counsel are the second, third and fourth. The second stated, in substance, that prior to any breach of the contract sued on, said Hinchman had sold out his livery stable and was not engaged in said business, and that said contract was joint.

The third paragraph alleged that whatever contract was made between the plaintiffs and the defendants was a joint contract, including said Hinchman, and that whatever sum they obligated themselves to pay was payable to the plaintiffs and said Hinchman jointly and not severally.

The fourth paragraph averred, in substance, that the plaintiffs and said Hinchman purchased all the stock of said Johnson Bros., each purchasing separately certain parts thereof; that the plaintiffs purchased \$800 worth and executed their note therefor, and Hinchman purchased \$700 worth; that the parties took and removed the property of each so purchased to their respective stables; that they did not, either jointly or separately, buy any part of the stable in which said Johnsons were doing business or any interest in the lease thereof held by said Johnsons, nor did they, jointly or separately, ever occupy or contract to occupy said leased property as a place of business; that at the time of said sale the parties made a written contract, substantially as set out in the third paragraph of the complaint; that before there was any breach of said contract, as alleged in the complaint, said Hinchman sold out his livery stable and went out of the

livery business, and said Johnsons did not violate the contract while Hinchman was engaged in said business. ;

It is suggested that the complaint was insufficient, because it contained no averment that Hinchman continued in business until the 1st of May, 1883, the date of the alleged breach; also, because it did not show any special damage; also, because it did not show the purchase of the stand or the delivery of anything but certain goods. It is further insisted that the complaint failed to show any consideration for the contract sued on, and that said contract was void because in restraint of trade.

In support of the answers, it is claimed that the contract being shown to be a joint one, when Hinchman retired from business the Johnsons were released from the obligation under said contract. It is also insisted that the answers presented a good defence by showing that the plaintiffs and Hinchman bought the stock separately, and, therefore, that the contract sued on was without consideration; also, by showing that no good-will was sold to the plaintiffs and Hinchman.

The restraint of trade imposed by the contract was not unreasonable. The restraint was merely partial, and applied to a very narrow space—a particular business stand. By the contract, as shown by two paragraphs of the complaint, the restraint was confined to the duration of the term of a lease extending to a certain date; and according to the form shown by one paragraph of the complaint and one paragraph of the answer, the restraint was to continue as long as the lease should last, or as long as the plaintiffs and Hinchman should be engaged in the livery business. The restraint was not more extensive than the purchasers had a right to require for their protection. See *Wiley v. Baumgardner*, 97 Ind. 66 (49 Am. R. 427), and cases there cited.

Though the goods transferred to the plaintiffs and Hinchman were intrinsically worth the amounts paid by the purchasers, yet, by the agreement in restraint of trade, the buyers were induced to purchase the entire stock of the rival estab-

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lishment. We can not undertake to inquire as to the adequacy of the consideration, as to which the parties had the right to determine for themselves. It is sufficient for us that there was a valuable consideration for the agreement. So are the modern authorities. *Guerand v. Dandeleit*, 32 Md. 561; S. C., 3 Am. R. 164; *Benj. Sales*, 3d Am. ed., section 526. See, also, *Wolford v. Powers*, 85 Ind. 294 (44 Am. R. 16).

It was not essential to the validity of the restraint that the lease should be transferred, or that the business should be continued by the purchasers in the leased premises, or that there should be a sale of the good-will of the business. To hold otherwise would be to place an injurious restriction upon the parties without subserving any interest of the public. The purpose of the purchasers seems to have been to do away with rivalry at a particular stand, and thereby to promote their businesses already established at other places in the same town. Doubtless, the good-will of such an establishment would consist largely in the advantage acquired on account of its local position, and to this extent the good-will could pass only with the place. What, if any, additional benefit would have passed to the purchasers, or of what privilege, if any, the sellers would have been deprived by an express transfer of the good-will, without a continuing of the business at the same stand (see *Rawson v. Pratt*, 91 Ind. 9), we need not determine. That an agreement in partial restraint of trade, in order to be valid, must always be part of a contract by which the good-will of a business is sold, is not true, as seems to be supposed by counsel. As a condition to the purchase of the stock used in the business of the rival establishment, it could be agreed validly that the sellers should not use the same building as a livery stable.

The complaint was not defective because no special damage was alleged. It was the manifest intention of the parties in said contract to designate a sum as agreed upon by them for the amount of damages recoverable for the doing by the sellers of a single thing, the actual damages that would re-

sult from which being, in the nature of things, uncertain and indeterminate. Said stipulated damages stood as a continuing security against the opening of a rival business at a particular stand. The amount so provided for was not a penalty, but constituted liquidated damages. *Pomeroy Eq. Jur.*, section 442; 1 *Sutherland Dam.* 507; *Holbrook v. Tobey*, 66 *Maine*, 410; *S. C.*, 22 *Am. R.* 581; *Duffy v. Shockey*, 11 *Ind.* 70; *Studabaker v. White*, 31 *Ind.* 211; *Spicer v. Hoop*, 51 *Ind.* 365.

The complaint, in each paragraph, gave a sufficient reason for not joining Hinchman as a plaintiff, and for making him a defendant. Section 269, *R. S.* 1881.

It was not necessary to the liability of the Johnsons under the contract, that Hinchman should have been still in the business when, on the 1st of May, 1883, business was resumed at the Johnson stable. Under any form of the contract shown in the pleadings, it would be a breach for the Johnsons or either of them to resume business in said stable during the existence of their lease, if at the time of such resumption the plaintiffs were still engaged in said business in said town, and therefore subject to be injured by such resumption, though Hinchman were not still in said business. The agreement was made for the protection of the plaintiffs and for the protection of Hinchman. The interest of Hinchman was of the same kind as that of the plaintiffs, but separate therefrom; and when Hinchman had retired from the business, the interest of the plaintiffs still was protected by the agreement. As long as the plaintiffs could be injured by a violation of the agreement, they had a right to sue thereon for damages, if there was a breach. The fact that Hinchman retained no interest to be protected did not render the contract worthless to the plaintiffs. The parties had not agreed upon one amount as damages for Hinchman and another amount as damages for the plaintiffs. The Johnsons reserved to themselves the privilege of resuming the business subject to liability to pay for the exercise of the priv-

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ilege a certain amount as damages. The plaintiffs were not required or entitled to show their actual damages; they could only sue for the liquidated damages. The Johnsons could not raise any question as to the apportionment of the damages. When Hinchman disclaimed any right to share in the damages, the plaintiffs still were entitled to recover for the breach of the contract. There was no criterion by which to adjudge to them any aliquot part of the liquidated damages. The person entitled to recover under the contract could have judgment for the whole amount of the damages stipulated. See *Dunlop v. Gregory*, 10 N. Y. 241.

We find no error in the rulings upon the demurrers to the complaint and the demurrers to the answer. On the trial there was no evidence in support of the cross complaint. The evidence introduced sustained the verdict.

Some instructions asked by the defendants were refused by the court. They are not shown to have been signed by the defendants or their attorney. There could be no error, therefore, in refusing to give them to the jury. *Beatty v. Brummett*, 94 Ind. 76. Besides, it is not shown that all the instructions given to the jury are contained in the record. This is a sufficient reason for the refusal of this court to examine those refused. *Newcomer v. Hutchings*, 96 Ind. 119.

The only objection urged against instructions given is that thereunder the jury were permitted, if they should find for the plaintiffs, to assess the full amount of damages agreed upon in the contract in suit. What has been said disposes of this objection.

James M. Gwinn, testifying as a witness for the plaintiffs, stated his recollection of the contents of the lost contract, in answer to questions of counsel, who then asked the witness, "Is that all that you remember of the contents of the instrument?" The witness asked that his evidence be read to him. The record shows that there was an objection, it not being stated by whom, "to the reading of the contract over to the witness, to the end that he may supply any omissions or add

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anything to it, the proper course being for him to give his recollection of it." And the record proceeds: "The court overrules the objection, and permits the contract of the witness to be read over to him, as he has stated it. Exception. Question. Is that all that you remember of the contents of the instrument? do you remember of anything else being in the contract? Ans. I don't think of it right now."

It does not further appear what was read to the witness, or that anything was read to him. But assuming it to sufficiently appear that his testimony as to the contents of the instrument was read over to him, we can not see that the appellants were injured by the action of the court. The witness did not add to, or subtract from, his former statements. Further, we think that the witness had a right to have his memory so refreshed, and showed commendable caution, and that the action of the court was not subject to criticism. The reading of the evidence to the witness was a not improper complement of the question asked him.

One of the defendants, William F. Johnson, testified as a witness for the defendants, who offered to prove by him that he had at no time, in person, or in connection with his co-defendant Joseph T. Johnson, started a livery stable at the stand on Morgan street, and had at no time hired, or fed for hire, any livery rigs or horses, since the sale of the stock to the plaintiffs and Hinchman. The court refused the offer. To perform the agreement, as shown in either paragraph of the complaint, both of the Johnsons would have to refrain from resuming said business. It would be a violation for which they would both be liable for either of them to engage in the business at said stand, either as partners or after the dissolution of their partnership. See *Stark v. Noble*, 24 Iowa, 71; *Dickson v. Indianapolis, etc., Co.*, 63 Ind. 9, 14. To show that one of the Johnsons had not engaged in the business, would be no defence. There was no evidence introduced or offered to show the resumption of the business by any other than Joseph T. Johnson.

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We think there was no error in the rejection of this offered evidence.

There was also an offer to prove by this witness that the carriages, sleighs and livery rigs sold were at the time of the sale worth \$1,850. What we have said concerning the question of the consideration of the agreement in restraint of trade sufficiently indicates that there was no error in rejecting this evidence.

George W. Young, a witness for the defendants, testified that he had seen the contract in suit and had read it. Counsel for the plaintiffs interposed the question, "Did you copy any part of that contract?" The witness answered in the affirmative. Counsel for the defendants then asked this witness to give the language, as nearly as he could. Objections being made, the court offered to permit the witness, in answer to a proper question, to give his recollection of the contents of the contract, so far as he had not a copy thereof. Without producing the copy, or accounting for its absence, the defendants offered to prove by this witness that the contract examined by him contained a certain statement set out in the offer, and the court rejected this offer.

Whether there was error or not in this action of the court, the appellants could not be injured by the rejection of the offered evidence. The form of the contract which they thus proposed to prove was substantially that of the contract set out in the third paragraph of the complaint. We can not see how the admission of the evidence could have benefited the appellants or produced a different result.

We find no available error, and are of opinion that the judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed Feb. 20, 1885.

Shuee *et al.* v. Shuee.

No. 11,182.

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CONTRACT.—*Rescission.*—*Equity.*—*Pleading.*—*Complaint.*—*Demurrer.*—In equity, the court may require a plaintiff to do equity, as a condition upon which it will grant relief, and a failure to show in the complaint to rescind a contract, that the plaintiff has offered to do equity before suit brought, if the complaint offer to submit to the order of the court in that respect, does not necessarily render it bad on demurrer.

SAME.—*Family Settlement.*—Complaint by a widow to set aside a family settlement, by which she had accepted payment of a sum greatly less than she was by law entitled to, in full of her share of her deceased husband's estate. The complaint offered to submit to such terms as the court would decree, but did not aver an offer to rescind or repay before suit brought.

Held, that it was sufficient on demurrer.

SAME.—*Fraud.*—A husband, seventy years of age, died intestate, owing no debts, with an estate, exclusively personal, of \$21,529, a childless widow and three children by a former marriage surviving. While living, he had given to his children all his real estate and \$6,000 in cash, and at the same time \$9,000 to the wife, for which she had executed a receipt to him as for "my share of division in the estate." At the marriage she had nothing. He had accumulated his estate, was sixty years old and eight years her senior. After his death, it being rumored that she claimed a further share, there was a meeting of the heirs and herself, attended also by a reputable and intelligent neighbor, who was a mutual friend, of kin to all the parties and had their confidence, whose presence the heirs had requested in the belief that he might be able to promote an amicable adjustment. All parties knew the facts, and the widow was a woman of ordinary mind, intelligence and business experience, but in infirm health temporarily. The only statement by the neighbor to her, subject to question, was that the \$9,000, which she had received, would be charged to her in the final settlement. She named the sum of \$2,000 as satisfactory; her proposition was accepted, the money paid, and she executed an assignment to the heirs of all her interest in the estate.

Held, that there was no fraud, actual or constructive, and no ground for annulling the settlement.

From the Tippecanoe Circuit Court.

J. R. Coffroth, T. A. Stuart, G. O. Behm, A. O. Behm, C. E. Lake and J. S. McMillin, for appellants.

W. H. Bryan, W. P. Wood, W. D. Wallace and W. C. L. Taylor, for appellee.

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MITCHELL, J.—Susan Shuee brought her bill in equity in the circuit court of Tippecanoe county, asking that upon the facts stated therein she should be relieved from a certain deed or contract of settlement, executed by her, whereby she had assigned and released her interest in the estate of David Shuee, her deceased husband, to his children by a former marriage. The deed which is exhibited with her bill is of the tenor following :

“Whereas, my late husband, David Shuee, deceased, shortly prior to his death, made a partial distribution of his estate by conveying by deeds of conveyance, in which deeds I joined as his wife, certain real estate in Tippecanoe county, Indiana, to the children and heirs of said David Shuee ; and whereas, I have heretofore received of said David Shuee the sum of nine thousand dollars (\$9,000), to be applied on my interest in the estate of said David Shuee, deceased, and have this day received of William D. Shuee, administrator of the estate of David Shuee, deceased, the sum of five hundred dollars (\$500) as and for the amount allowed me by law as the widow of said David Shuee, the receipt whereof is hereby acknowledged : Now, in consideration of the further sum of fifteen hundred dollars (\$1,500), to me in hand paid by William D. Shuee, Amanda Kirkpatrick and Josephine Chappell, the receipt whereof I hereby acknowledge, I hereby assign and set over to the said William D. Shuee, Amanda Kirkpatrick and Josephine Chappell, the children and heirs of said David Shuee, deceased, all further right, title and interest which I may have, of whatever nature, in and to the estate, both real and personal, of said David Shuee, deceased.

“Dated the 28th day of May, 1881. SUSAN SHUEE.”

Issues were duly made, and on the hearing the court, having been requested to do so, found the facts specially and stated its conclusions of law thereon.

The material facts found were that David Shuee and Susan Shuee were married in May, 1871, and after living together amicably for a period of about nine years and a half, David

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Shuee died, leaving three children by a former marriage as his only heirs at law, and his widow, who was his second wife, and with whom he had no children, and leaving a personal estate amounting in value to about \$21,529, and leaving no debts and no real estate.

The plaintiff had been married twice before her marriage to Shuee, and had children living by each of the former marriages. She had no property at the time of her marriage with Shuee, who, previous to that time, had acquired the bulk of all his property, and who, at the time of his death, was aged about seventy, the plaintiff being about eight years his junior.

In 1879 the deceased gave to each of his three children \$2,000, giving to his wife at the same time \$3,000, and in the year 1881 he gave to his children all of his real estate—\$18,000 in value—about the same time giving his wife in cash \$6,000.

At the time the last sum of money was paid her a receipt was prepared by the direction of her husband, which, after some changes, made to suit the plaintiff, was signed by her, and which reads as follows:

“April 20th, 1881.

“This certifies that I have received nine thousand dollars of David Shuee, being my share of division in the estate.”

On the 27th day of May, 1881, the plaintiff having waived her right to administer upon her deceased husband's estate, William D. Shuee was duly appointed and qualified as administrator, and learning that their step-mother was making further claims upon the estate, the heirs procured the assignment hereinbefore set out to be prepared by their attorney, leaving the date and amount of consideration blank. They then procured a Mr. Davidson, who resided in the neighborhood, to meet them at the plaintiff's residence, that being also the residence of Josephine Chappell, one of the heirs, to assist in negotiating a settlement with the plaintiff. It is found that Davidson was an old resident of the neighborhood, a man esteemed for his intelligence, judgment and probity, who some-

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times assisted litigants in the neighborhood before magistrates, had some experience in the settlement of estates, was a practical farmer, and not a lawyer. He enjoyed the entire respect and confidence of the plaintiff and defendants as well, and was related to all the parties. He was selected by the heirs because of their belief, that on account of his character and relations he would be better able to bring about a settlement between the parties than they themselves.

The plaintiff, at the time, was in a somewhat temporarily enfeebled condition of health, was a woman of fair average mental force and intelligence, with such business experience and capacity as are ordinary with women.

The heirs and Mr. Davidson having assembled at the plaintiff's residence on the 28th of May, 1881, she was informed by Mr. Davidson that the heirs desired to ascertain from her what she would take in addition to what had been paid her and release to them all her claims in the estate. After negotiations were had back and forth between the heirs and the plaintiff, such negotiations being conducted by Mr. Davidson, the plaintiff fixed her price at \$2,000, saying that if she did not get that she would not take anything.

The contract was closed at \$2,000, and the paper correctly read over to her before it was signed, William D. Shuee paying the money over to her out of funds which were in his hands as administrator, but he at the same time distributed \$1,500 among the heirs, so that in effect each of the heirs paid \$500 of the \$1,500, while the administrator paid \$500 to plaintiff as widow.

During the negotiations, the plaintiff, as it appears, was in no way misinformed as to the amount, value or condition of the estate of her husband; she was advised, however, by Mr. Davidson that in view of the fact that she had received \$9,000 from her husband in his lifetime, he thought she ought to settle with the heirs on the basis proposed; and he also told her that the \$9,000 which she had received would be charged against her in the final settlement.

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The plaintiff has, ever since the settlement, retained the money paid her, and has not offered to rescind the contract or return all or any part of the money, nor has she brought it into court, but she does aver in her complaint that she is ready to abide the order of the court in that regard, and she also made a like offer at the trial.

The court inferred from the foregoing facts that the deed of settlement was procured by constructive fraud, and stated as a conclusion of law that it ought to be set aside, and that an offer to rescind before the commencement of the suit was not necessary, and that the plaintiff should recover.

It is urged that the court below should have sustained a demurrer to the bill, because it failed to show an offer to rescind on the part of the plaintiff before filing the bill, and it is argued that because it appears from the facts as found by the court, that no offer to rescind was made, nor to return the money paid as the consideration of the settlement, before the suit was commenced, the court could make no decree in the plaintiff's favor setting aside the settlement.

It is always within the power of a court of equity, where its decree is invoked, to require as "the price of its decree," that the person invoking it shall submit to equitable terms, and accordingly a chancellor always inquires concerning the equities which the plaintiff must do, in order that he may be entitled to the relief which he seeks. Whenever any benefit has been received under a contract which the court is asked to set aside, the court will fasten a trust on the conscience of the party, in respect of such receipts, and direct an account and repayment.

As was said by the vice-chancellor in the case of *Hanson v. Keating*, 4 Hare, 1: "It decides in the abstract, that the court, giving the plaintiff the relief to which he is entitled, will do so only upon the terms of his submitting to give the defendant such corresponding rights (if any) as he also may be entitled to in respect of the subject-matter of the suit." Or

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as Lord Erskine put it in *Radcliffe v. Warrington*, 12 Vesey, Jr. 332: "The question is, not, what the court must do, but, what it may do" under all the circumstances. *Quinn v. Britain*, 1 Hoff. Ch. 353; *Hopkins v. Snedaker*, 71 Ill. 449; *Whelan v. Reilly*, 61 Mo. 565; *Comstock v. Johnson*, 46 N. Y. 615; *Willard v. Tayloe*, 8 Wall. 557; *Miller v. Cotton*, 5 Ga. 341.

If the plaintiff in this case is entitled to have her deed of assignment cancelled, then she will be let in to share in a fund from which she is entitled to receive a much larger sum than she has in her hands, and having offered in her bill, and at the hearing, to submit to such decree as the court should award her, the fact that she did not return, or offer to return, the sum paid her, is no obstacle in the way of the jurisdiction of the court. Bisph. Prin. Eq., section 43.

We are now to determine whether, upon the facts found by the court, an inference of constructive fraud arises justifying the conclusions of law stated.

We will first consider the agreement with which we are here concerned as falling within the class denominated "family settlements." In one aspect of the argument, plaintiff's counsel apply to the transaction the rules and principles applicable to sales of expectancies or reversionary interests in estates, but it is not perceived that those rules are involved to any extent. The subject-matter here was a sum of money and personal securities belonging to the estate of David Shuee, deceased. The amount was fully ascertained; the estate owed no debts; the persons interested were, so far as appears, fully capable of settling the estate by a division of the assets as well without as with administration, and but for the question of their respective rights, in view of what had been agreed to when previous divisions had been made during the lifetime of the decedent, they might as well have divided up the assets then as later. Nor had the doctrines applicable to trustees and *cestuis que trust* more than an incidental application to the case.

The substance of the transaction was that the three chil-

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dren of David Shuee by a former marriage, having heard after the death of their father, through Mr. Graves, that the plaintiff, their step-mother, was claiming to be entitled to share in the estate of their father, sought the intervention of a mutual friend, and with him met at the homestead for the purpose of negotiating a settlement and purchase of her interest. The question was mooted whether or not the \$9,000 which she had received during the lifetime of her husband would or would not be taken into the account against her upon the final settlement. Something was said by Mr. Davidson, in answer to an inquiry from her, as to what he thought she ought to do, in view of the liberality of her husband toward her in his lifetime.

The amount of the estate was fully disclosed to her; the amount which she had received, and what she ought to do in view of that fact was set before her by Mr. Davidson, who also expressed the opinion that the sum already received by her would be charged against her in the final settlement of the estate, and, after negotiation back and forth, an amount named by the plaintiff was agreed upon, the contract previously prepared was read over to and signed by her, and the money paid and the settlement completed.

There was, at the time of the negotiation, before the minds of the parties, the amount of the estate, the amount which had been distributed in his lifetime by the husband to his wife and children, and the difference of opinion concerning her right to participate farther, and the extent to which she was entitled to share, if at all. The settlement of this question is to be regarded in all its essential features a "family settlement."

The circumstance that the son, William D. Shuee, had been appointed administrator of the estate the day before the settlement was made, can have no controlling influence, as this was all known to the plaintiff. The settlement must stand or fall on its own merits as such.

Family settlements, when made in good faith and with full

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disclosure, are looked upon with favor in equity, and will be sustained by the courts, "albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between strangers." All such agreements are favorably regarded in courts of equity, and are supported not only as beneficial in themselves, but as conducing to peace and harmony, and it is universally held, that in order to set aside such a settlement, overreaching fraud or mistake must be shown. Where, upon investigation, it is found that nothing of the kind exists, the settlement should be upheld.

Where a doubt or dispute exists with respect to the rights of parties interested in an estate, and all have the same knowledge or the means of obtaining knowledge in relation to the circumstances in which their rights are involved, and there is no concealment, misrepresentation or other overreaching, a settlement of such doubt or dispute is to be upheld and enforced, unless it turns out to be so unfair as to be manifestly unconscionable. Bisph. Prin. Eq. 189; 2 Pomeroy Eq. Juris., section 850; *Shartel's Appeal*, 64 Pa. St. 25.

Within every rule applicable to family compromises or settlements, this agreement should be maintained. Aside from the consideration that this was a family settlement, we have considered the transaction on its inherent merits, and without going into the details, we are of opinion that even eliminating from this settlement the favor in which it ought to stand as a family settlement, it should not fall under the condemnation of having been obtained by fraud, either actual or constructive. With the settlement as it is, the widow and children of David Shuee will have participated in his estate on a basis of fair equality; with the settlement abrogated she will possibly be entitled to receive such a sum as, added to what she has already received, will be out of all just proportion to the amount which, under all the circumstances, she should receive.

The conclusion at which we have arrived is, that the inference of fact, that there was constructive fraud in procuring

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the plaintiff to sign the settlement, is not warranted by the facts found, and that in stating its conclusions of law for the plaintiff the court erred.

Upon the facts found the conclusions of law should have been for the defendants.

The judgment is reversed with costs, with directions to the court to proceed in accordance with this opinion and enter judgment for the defendants.

Filed Jan. 30, 1885; petition for a rehearing overruled April 4, 1885.

No. 12,099.

HOWLETT v. SCOTT.

EVIDENCE.—*Practice.*—Error in admitting testimony is not available where no objection is made to its introduction, and no motion made to strike it out.

SAME.—It is not error to reject evidence which, if admitted, would not have any effect on the finding.

From the Marion Superior Court.

H. N. Spaan, for appellant.

F. Rand and *J. M. Winters*, for appellee.

BICKNELL, C. C.—The complaint of the appellee in this suit was in three paragraphs.

The first paragraph alleged that the defendant sold to the plaintiff a car load of wheat, No. 3340, and never delivered it, although plaintiff had paid him \$500 on account of it; that the wheat was to have been delivered in a reasonable time, and that the defendant, on demand, after the lapse of a reasonable time, had refused either to deliver the wheat or pay back the money.

The second paragraph alleged substantially the same facts as to another car load of wheat, No. 3610.

The third paragraph was a common count for \$1,000, for

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money loaned, and money advanced, and money laid out and expended by plaintiff for defendant.

The answer of the defendant was a general denial. There was a trial by the court in special term, with a finding for the plaintiff for \$1,000. Judgment was rendered on the finding. A motion by the defendant for a new trial was overruled. The defendant appealed to the court in general term, assigning for error the overruling of his motion for a new trial.

The court in general term affirmed the judgment of the court in special term. The defendant appealed to this court. He assigns for error here that the court in general term erred in affirming the judgment of the court in special term.

The appellant, in his brief, discusses only the following alleged errors of the court in special term:

1. That the court erred in admitting in evidence the testimony of Charles Seaton, stating a conversation between himself and one Spotts. But this is not an available error, because the bill of exceptions shows that no objection was made to the introduction of this testimony, and that no motion was made to strike it out. After the testimony was heard the defendant's counsel said: "We object to the witness stating what was told him, because it was incompetent and irrelevant, being hearsay; all hearsay is objected to."

The objection thus made was the only objection, and this the court overruled.

2. That the court erred in rejecting a protest, offered by defendant, of a \$500 check on the First National Bank of Indianapolis, dated August 11th, 1883.

It appeared that this check had been taken up by another check for \$500 which had been paid. The evidence tended to show very clearly that the defendant had sold wheat to the plaintiff, and had been paid for it in three checks, two of \$250 each, and one of \$500, and had never delivered the wheat, and that the checks had been paid. The proof offered as to the protested check, afterwards taken up, could not, if admitted, have had any effect upon the finding.

The State, *ex rel.* Mayfield, v. Myers.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed Feb. 18, 1885.

No. 11,765.

THE STATE, EX REL. MAYFIELD, v. MYERS.

DRAINAGE.—*Complaint for Assessments.—Exhibits.*—In a suit by a commissioner of drainage to collect an assessment of benefits, a copy of the assessment should be made a part of the complaint; otherwise it will be bad, and a bad answer sufficient for it.

SAME.—*Answer.*—To a good complaint in such case, an answer is bad which shows that the original petition for drainage was defective.

From the Knox Circuit Court.

C. M. Wetzel, for appellant.

F. W. Viehe and M. J. Niblack, for appellee.

FRANKLIN, C.—Appellant as commissioner of drainage for Knox county, commenced this suit against appellee for the collection of an assessment of benefits to pay for the construction of the drain.

A demurrer to the complaint was overruled; the defendant answered in two paragraphs, specially and the general denial; a demurrer to the first paragraph of answer was overruled; plaintiff elected to stand upon the ruling upon his demurrer to the first paragraph of answer, and declined to further reply, and judgment was rendered for the defendant.

The only error assigned is the overruling of the demurrer to the first paragraph of the answer.

The material averments in the first paragraph of answer are as follows: That the petition for drainage "neither at the time it was filed, nor at any time thereafter, stated that by the proposed drainage either the public health would be improved, or that any highway or street would be benefited thereby, or that the proposed work would be of public utility,

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and did not state that in the opinion of the petitioners, the proposed drainage would have any of these effects, and stated nothing concerning these matters." The above is copied from appellee's brief.

This paragraph of answer only attacks the sufficiency of the petition, and comes too late to be a defence to an action to collect an assessment. The court had jurisdiction of the subject-matter.

Objections to the petition, in order to be available, must be made before the order or "judgment of the court confirming and establishing the assessment of benefits and injuries." See section 4280, R. S. 1881, and section 6 of the act approved March 8th, 1883, Acts 1883, p. 173, which read as follows: "This act shall be liberally construed to promote the drainage and reclamation of wet or overflowed lands; and collections of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessment of benefits and injuries; but such judgment shall be conclusive that all prior proceedings were regular and according to law." But if this paragraph of answer be bad, there was no error in overruling the demurrer to it, unless there was a good complaint. The complaint states the substance of the proceedings to establish the drain and the assessment, but does not contain a copy of the assessment, nor make it any part of the complaint by exhibit or otherwise. The notice, which is made a part of the complaint, contains a copy of the estimates of benefits, but not of injuries. The notice can not be the foundation of this suit, and can not take the place of a copy of the assessment. It is the assessment that creates the lien, gives the right of action, and is the foundation of the suit. See section 4278, R. S. 1881, and section 5, Acts 1883, p. 179. It must therefore be made a part of the complaint, in order to constitute a good cause of action. *Roberts v. State, ex rel.*, 97 Ind. 399; *Smith v. Clifford*, 83 Ind. 520; *Crist v. State, ex rel.*, 97 Ind. 389; *Albertson v. State, ex rel.*, 95 Ind. 370.

The State, *ex rel.* Morley, *v.* Johnson *et al.*

The complaint must be held bad, and there was no error in overruling the demurrer to that paragraph of the answer. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Feb. 20, 1885.

No. 12,026.

THE STATE, EX REL. MORLEY, *v.* JOHNSON ET AL.

TOWNSHIP TRUSTEE.—*Eligibility.*—A township trustee who has been in office two consecutive terms immediately preceding the election at which he offers himself as a candidate is ineligible.

SAME.—*Election.*—*Votes for Ineligible Candidate.*—Votes cast for a person not eligible to election can not be counted against eligible candidates.

SAME.—*Qualification.*—*Forfeiture of Office by Failure to Qualify.*—A person elected to the office of township trustee who fails to give bond as required by section 5527, R. S. 1881, for more than six months after the election, will be deemed to have abandoned the office unless some satisfactory excuse for the delay is shown.

From the Tippecanoe Circuit Court.

W. C. Wilson and *J. H. Adams*, for appellant.

H. W. Chase, *F. S. Chase* and *F. W. Chase*, for appellees.

ELLIOTT, J.—The material facts stated in the relator's complaint are these: Johnson was the auditor of Tippecanoe county in April and November, 1878, and his co-appellees were sureties on his official bond. The relator was eligible to the office of trustee of Fairfield township, and was a candidate for that office in the spring of 1878. There were three candidates voted for at that election, the relator, Daniel Mueller and Michael Gallagher. The latter was ineligible because he had held the office for two consecutive terms immediately preceding the election. The candidates respectively received of the votes cast the following: Gallagher, eleven hundred and fifty-eight; the relator, nine hundred and fifty-seven; and

100	489
126	58
100	489
128	488
100	489
145	359
100	489
154	390
154	391
100	489
180	188
100	489
168	513
100	489
169	71

The State, *ex rel.* Morley, v. Johnson *et al.*

Mueller, eight hundred and eighty-nine. On the 29th day of November, 1878, the relator tendered to the auditor a sufficient bond, and that officer refused to accept or approve it.

Our decisions establish these propositions:

A township trustee who has been in office for two consecutive terms immediately preceding the last election at which he offers himself as a candidate is ineligible. *State, ex rel., v. Gallagher*, 81 Ind. 558; *State, ex rel., v. Adams*, 65 Ind. 393; *Jeffries v. Rowe*, 63 Ind. 592.

Votes cast for a person not eligible to office can not be counted against the eligible candidate, receiving the highest number of votes. *Waldo v. Wallace*, 12 Ind. 569; *Gulick v. New*, 14 Ind. 93; *Carson v. McPhetridge*, 15 Ind. 327; *Howard v. Shoemaker*, 35 Ind. 111; *State, ex rel., v. Gallagher, supra.*

It follows from these settled propositions, that if the relator did not lose his right to the office by a failure to qualify within the time limited by law, he has a cause of action against the auditor and his sureties for a refusal to accept and approve the bond tendered.

The relator did not tender his bond until more than six months after his election, and he shows no excuse for this long delay. Our statute requires that official bonds shall be filed within ten days after the receipt of the commission or certificate, and we think one who is elected to an office and delays filing his bond for a period of six months has no right to maintain an action against the auditor for refusing to accept and approve it. The statute is plain. It reads thus: "If any officer of whom an official bond is required shall fail, within ten days after the commencement of his term of office, and receipt of his commission or certificate, to give bond in the manner prescribed by law, the office shall be vacant." R. S. 1881, section 5527.

The relator, having so long delayed to file his bond, and showing no excuse for the delay, must, in such a case as this, be deemed to have abandoned the office. Having once elected to abandon the office, he can not resume it at his own pleasure.

Bogard, Administrator, v. Louisville, Evansville and St. Louis R. W. Co.

The object of the statute is to compel a person chosen to office to qualify within the time prescribed, and if, without legal excuse, he fails to do so, he is in fault, and must lose the office. If a person elected to office were at liberty to file a bond within six months, he would have, upon the same principle, a right to file it at any time before the expiration of the term, and thus great uncertainty, confusion and evil would result. If he is not in fault, then the lapse of time might not deprive him of the office, but it is incumbent upon him to explain the delay and exculpate himself from blame. This has not been attempted in the case in hand.

It is not to be presumed that the auditor violated his official duties, and it therefore devolved upon the relator to state such facts as showed that he was in the right and that officer in the wrong. *Jackson School Tp. v. Furlow*, 75 Ind. 118. Judgment affirmed.

Filed Feb. 21, 1885.

No. 11,634.

**BOGARD, ADMINISTRATOR, v. THE LOUISVILLE, EVANSVILLE
AND ST. LOUIS RAILWAY COMPANY.**

MASTER AND SERVANT.—Fellow Servant.—Negligence.—Employing or Retaining Incompetent Servant.—Notice.—Pleading.—Complaint.—A master is not liable in damages to a servant for injuries resulting from the negligence of a fellow servant engaged in the same general employment, unless he has been guilty of negligence in the employment of, or, after notice, continues in his employment, the negligent or incompetent employee through whose negligence the injury was caused, and such negligence on the part of the master must be averred in the complaint.

SAME.—Who are Fellow Servants.—Pleading.—One who is engaged in hauling rock by means of a team, and those who are engaged in blasting such rock, all employed by a common master, are fellow servants, and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employees of the defendant who were engaged in blasting rock," is a mere conclusion, and the facts will control.

From the Floyd Circuit Court.

100	491
134	162
134	467

Bogard, Administrator, v. Louisville, Evansville and St. Louis R. W. Co.

J. H. Stotsenburg, for appellant.

A. Dowling, for appellee.

COLERICK, C.—This action was brought by the appellant to recover damages for the death of her intestate, which it was alleged was caused by the negligence of the appellee.

A demurrer was filed to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, to which ruling the appellant excepted, and, refusing to amend her complaint, final judgment, on demurrer, was rendered against her, from which she has appealed to this court.

The only question presented by the assignment of errors for our consideration is, was the complaint sufficient on demurrer? Its material averments were: "That before and on the 25th day of September, 1881, the said plaintiff's intestate, Walter T. Bogard, was employed by the said defendant in hauling rock, by means of a team, out of a deep cut on the line of said road, and that he had no connection whatever with any of the employees of said defendant who were engaged in blasting rock for said defendant in said deep cut; that while he was lawfully engaged in the work assigned to him, and after his work for the day was done, and as he was about to put away his team, he was, without any fault or negligence whatever on his part, killed by the wrongful acts and omissions of the said defendant, in the following manner, viz., a violent explosion of gunpowder or other inflammable material used for the purpose of splitting rocks in the said deep cut, was caused by the act of certain employees of the said defendant, and the said explosion was so violent that a large piece of rock, weighing over sixty pounds, was hurled with great force against the said decedent, killing him instantly, although he was two hundred and fifty yards from the said blast; that the said blast was carelessly and negligently prepared by the said defendant's employees, and that the broken rock that was necessary to be put upon the top of

Bogard, Administrator, v. Louisville, Evansville and St. Louis R. W. Co.

the powder used for the blast was only two inches in depth, when it should have been at least five inches deep, and that by reason of the death of said deceased the plaintiff has sustained damages in the sum of ten thousand dollars, for which she demands judgment."

It appears by the facts averred, that the death of the deceased was caused by the negligence of his fellow servants or co-employees, and hence, in the absence of an averment alleging that the appellee was guilty of negligence in the employment, or retention in its employment, of the persons by and through whose negligence the death of the decedent resulted, the complaint was insufficient, and the demurrer thereto was properly sustained.

A master is not liable in damages to an employee or servant for injuries resulting from the negligence of a co-employee or fellow servant engaged in the same general employment (*Indiana Car Co. v. Parker, ante*, p. 181, and the cases there cited), unless the master has been guilty of negligence in the employment of, or, after notice, continuing in its employment, the negligent or incompetent employee through whose negligence the injury was caused. *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134); *Boyce v. Fitzpatrick*, 80 Ind. 526; *Brazil, etc., Co. v. Cain*, 98 Ind. 282. No such negligence was imputed to or charged against the appellee in this case, and for the want of such an averment in the complaint it failed to state a cause of action against the appellee. *Brazil, etc., Co. v. Cain, supra*.

The averment that the deceased "had no connection whatever with any of the employees of the defendant who were engaged in blasting rock for said defendant in said deep cut" where his life, by their act, was lost, was a mere conclusion of the pleader. The facts averred show that they were his fellow servants or co-employees, although engaged in a different branch of the same general undertaking, and, therefore, the conclusion, being at variance with the facts, must be

Kennell *et al.* v. Smith.

controlled by them. See *City of Fort Wayne v. De Witt*, 47 Ind. 391. No error was committed in sustaining the demurrer to the complaint.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Feb. 18, 1885.

No. 11,488.

KENNEL ET AL. v. SMITH.

PRACTICE.—*Supreme Court.*—Where the evidence is not in the record, the Supreme Court will not review the finding of the trial court upon an issue of fact.

SAME.—*Assignment of Error.*—*Waiver.*—Assignments of error not discussed are considered as waived.

From the Cass Circuit Court.

M. D. Fansler, for appellants.

D. B. McConnell, *R. Magee* and *S. T. McConnell*, for appellee.

FRANKLIN, C.—This is a drainage proceeding commenced in the circuit court by appellee under the statute of 1881.

The petition was filed, notice given and proof filed; the matter referred to the drainage commissioners and their report filed, when appellants filed a remonstrance. There was a trial by the court, a finding for appellee, and, over motions for a new trial and in arrest of judgment, the ditch was established, ordered to be constructed, and one of the commissioners was appointed to superintend the work.

The errors assigned are:

1st. Overruling the demurrer to the petition and report of the drainage commissioners.

2d. Confirming the report of commissioners and establishing the ditch.

Kennell *et al.* v. Smith.

3d. Overruling motion for a new trial.

4th. Overruling motion in arrest of judgment.

The record does not show that any demurrer was filed to the petition or report of the commissioners. No question is presented by the first specification of error.

The only objection made to the confirmation of the report and the establishment of the ditch was made by filing the remonstrance. The only question presented and discussed by appellants in their brief is under the fourth cause of remonstrance filed by appellants, which reads as follows: "That it is not practicable to accomplish said proposed drainage without an expense exceeding the aggregate benefits."

This cause of remonstrance presented an issue of fact to be tried by the court, without a jury, and if the finding was in support of the remonstrance, the proceedings should have been dismissed. R. S. 1881, section 4276. Upon the trial the finding by the court was in favor of the petitioners. The evidence is not in the record, and no question is discussed or referred to in appellants' brief under the motion for a new trial. As to this fourth cause of remonstrance, no question is presented to this court in a way that any decision can be made upon it.

Nothing is said in appellants' brief in relation to the motion in arrest of judgment. This assignment of error is, therefore, considered as waived. We find no error in this record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed Feb. 14, 1885.

Berkshire Life Insurance Company v. Hutchings *et al.*

No. 11,480.

100 408
159 4BERKSHIRE LIFE INSURANCE COMPANY v. HUTCHINGS
ET AL.

MORTGAGE.—Assumption by Grantee of Mortgage Debt.—Acceptance by Mortgagee.—Rescission of Contract of Sale.—Foreclosure.—Personal Judgment.—Where A., the grantee of B., agrees to pay B.'s mortgage debt to C. as part of the purchase-money of land, A. does not thereby become the debtor of C., but there must be some act of adoption by C. to entitle him to the benefit of A.'s contract; and if, before such adoption, A. and B. rescind their contract, there is nothing left for C. except his original claim against B., and in a suit to foreclose his mortgage he is not entitled to a personal judgment against A.

SAME.—Notice of Acceptance.—Practice.—The question as to whether C. gave notice of his acceptance of A.'s assumption and agreement to pay the mortgage debt is one of fact, and the finding of the trial court will not be disturbed on the weight of the evidence.

From the Marion Superior Court.

M. B. Williams and W. Henderson, for appellant.

BICKNELL, C. C.—The facts in this case are fully stated in *Talbert v. Berkshire Life Ins. Co.*, 80 Ind. 434. In that case a judgment of said court in favor of the present appellant was reversed on an appeal by Talbert, because said court, in its special finding, had left undetermined one of the issues which said appellant was bound to prove, in order to recover a personal judgment against Talbert.

The complaint seeks to foreclose a mortgage executed to the plaintiff by Hutchings, and it demands a personal judgment against him on the notes, and a like judgment against Talbert, because he, as purchaser of the mortgaged premises, agreed with Hutchings to pay the mortgage debt as part of the purchase-money.

On the former hearing, this court held that when a mortgagor sells and conveys the mortgaged premises, and his grantee assumes the payment of the mortgage debt, the mortgagee, in a foreclosure suit, can not recover a personal judgment against such grantee, unless she has accepted him as her debtor. Prior to such acceptance, the mortgagor, orig-

inally the principal debtor, can not by such agreement of his grantee, be discharged, nor can he be made a mere surety for his grantee, without the assent of the mortgagee, but after such acceptance the grantee becomes the principal debtor, and the mortgagor is either absolutely discharged or remains liable as surety for his grantee, according to the agreement of all the parties. While the relations of such mortgagor and grantee remain unchanged, the institution of a suit against them by the mortgagee sufficiently indicates such acceptance, but if in the meantime, and before any acceptance, the relations between such mortgagor and grantee have been terminated by a *bona fide* rescission of their contract, the case becomes the same as if no such contract ever existed, and the right of the mortgagee as against such former grantee no longer exists.

If A., for a sufficient consideration, agrees with B. to pay B.'s debt to C., A. does not thereby become the debtor of C. It requires some act of adoption by C. to entitle him to the benefit of A.'s contract, and if before such adoption A. and B. rescind their contract, there is nothing left for C. except his original claim against B. *Davis v. Calloway*, 30 Ind. 112; *Miller v. Billingsly*, 41 Ind. 489; *Durham v. Bischof*, 47 Ind. 211; 2 Story Eq. Jur., section 973, n. 2; *Kelly v. Roberts*, 40 N. Y. 432; 1 Jones Mort., sections 763, 764; *Carnahan v. Tousey*, 93 Ind. 561.

The superior court, in special term, on a new trial, found for the defendant Talburt, who was the only party defending. At the request of the parties, the court made a special finding of the facts and stated conclusions of law thereon. There was no exception to the conclusions of law. The plaintiff moved for a new trial. This motion was overruled, and judgment was rendered on the finding. The plaintiff appealed to the court in general term. There the judgment was affirmed. The plaintiff appealed to this court.

The first error discussed by the appellant in its brief is, that
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the court in special term erred in overruling the appellant's demurrer to the first paragraph of the defendant Talburt's answer.

This paragraph of answer was pleaded to so much of said complaint as sought a personal judgment against Talburt. After admitting the principal allegations of the complaint, it alleges that after the execution of the deed from Hutchings, and before the defendant discovered that lots 117 and 118 had been conveyed to him instead of lots 217 and 218 which he had bought, he paid \$150 for the purpose of keeping down the interest which he supposed was on the lots so conveyed to him, but that the plaintiff never claimed of the defendant that he had agreed to pay said \$3,000 and interest, and never notified him that the plaintiff accepted his supposed promise to pay said debt; and that in the meantime, after the execution of said deed, and before the discovery of said mistake, judgments had been obtained against said Hutchings for an amount far exceeding the value of said lots, and he had become totally insolvent, and unable to make a good title to said lots 217 and 218, and that in consideration thereof said Talburt and Hutchings rescinded said contract for the sale of said lots, said Talburt agreeing that said Hutchings might retain all moneys paid by Talburt to him, and agreeing to give up all right of action against Hutchings on his covenants in said deed, and said Hutchings releasing said Talburt from his agreement to pay said mortgage debt. The answer also states that said Talburt never had possession of said lots 217 and 218.

Under the authorities above referred to, this was a good answer to a complaint seeking a personal judgment against Talburt.

In *Carnahan v. Tousey*, *supra*, this court said: "If the party, for whose benefit a contract is made, neglects to give notice of his acceptance of it, he incurs the peril of its abrogation, and if, without having given such notice, he brings an action, he may be defeated by the plea and proof of a rescission, accomplished before the service of the summons,

Berkshire Life Insurance Company v. Hutchings et al.

just as he may be defeated, if he does give notice, by proof of a rescission before the notice was served."

The consequences of a want of notice of acceptance would not be obviated by the fact that prior to the discovery of the mistake in his deed, Hutchings became insolvent and unable to make title to the lots sold. Such a fact would add nothing to the rights of the insurance company, although it might explain Talburt's desire to rescind the contract. The court in special term did not err in overruling the appellant's demurrer to the first paragraph of the appellee Talburt's answer.

The only reasons for a new trial, discussed in the appellant's brief, are, that the findings and decision of the court in special term are not sustained by sufficient evidence and are contrary to law.

These objections are discussed by the appellant with exclusive reference to finding No. 17, which is as follows:

"17. The plaintiff did not, prior to the date of said rescission between said Hutchings and Talburt, notify said Talburt that it, the plaintiff, had accepted said Talburt's assumption and agreement to pay the said mortgage debt."

Upon this point Talburt testified as follows:

Question. "State whether or not you at any time before the rescission received any notice from the Berkshire Life Insurance Company that they accepted your assumption and agreement to pay that debt?" Answer. "I never did."

Question. "State whether you ever received such a notice at any time?" Answer. "I never had any transaction with them (the Berkshire Company) until this suit was instituted; I did not know Mr. Henderson, and I had nothing to do with any one except Mr. Hutchings; it was between him and me."

The appellant claims that the following evidence overcomes this positive denial of Talburt, and shows that there was an acceptance by the plaintiff of Talburt's obligation, and that he was duly notified of such acceptance before the rescission.

It appeared in evidence that Hutchings had told Talburt that the interest was to be paid at the Bank of Commerce at

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Indianapolis, and that Talburt had paid four of the coupon notes for interest, and that he always got a notice of the maturity of each of these four notes from the teller or cashier, or some officer of said bank, and then remitted by draft.

These notices were in the following form:

"J. D. Hutchings: Your note for \$150 will be due at this bank November 14th, 1876. . A. JAMESON, Cashier."

It appeared also that William Henderson, the agent of the appellant, was the president of the Bank of Commerce, and that A. Jameson was cashier of said bank, and that Talburt received the following letter:

"I return your check on First National Bank. The note you have to pay is payable in exchange on New York. Please get from your bank a draft on New York and remit it to us by first mail. (Signed) WILLIAM HENDERSON, Pres."

Which letter Talburt answered as follows:

"*Alexander C. Jameson. November 13th, 1876:*

"DEAR SIR: Enclosed please find New York draft for one hundred and fifty dollars in payment of J. D. Hutchings' note, due 12th to 14th. You should have deposited my check and had your bank furnish you exchange since the note is payable in Indianapolis. Yours, truly,

"C. W. TALBURT."

Here was a question of fact to be determined by the court. The court trying the cause having found that there was no notice of the acceptance by the insurance company of Talburt's obligation, and there being evidence tending to support the finding, this court can not disturb it upon an alleged preponderance of evidence against it. *Western U. Tel. Co. v. Kilpatrick*, 97 Ind. 42; *Robinson v. Snyder*, 97 Ind. 56; *Frenzel v. Bradbury*, 97 Ind. 603.

We can not say that the finding and decision of the court are not sustained by the evidence or are contrary to law.

The superior court in general term did not err in affirming the judgment of the court in special term.

The judgment ought to be affirmed.

Hudnut v. Weir.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed March 12, 1885.

No. 11,759.

HUDNUT v. WEIR.

STATUTE OF FRAUDS.—*Parol Contract.*—*Personalty.*—*Consideration.*—A parol contract for the purchase of five thousand bushels of corn, at fifty cents per bushel, payable on delivery, the purchaser as a part consideration of the sale to furnish bags in which to put the corn when shelled, which he does to the value of \$100, is within the statute of frauds and can not be enforced.

SAME.—*Earnest.*—*Part Payment.*—In such case the delivery of the bags is not "earnest or part payment."

From the Posey Circuit Court.

A. P. Hovey and G. V. Menzies, for appellant.

W. P. Edson, for appellees.

MITCHELL, J.—The facts, as stated in the complaint, are, that in January, 1883, Charles Weir sold to Theodore Hudnut five thousand bushels of corn then owned by him, for which Hudnut agreed to pay fifty cents per bushel, the corn to be delivered by the seller on the bank of the Wabash river. As a part of the consideration of the sale the purchaser agreed to furnish sacks in which to put the corn after it was shelled, and it was agreed that he should receive, take away, and pay for the corn as soon as it was shelled and delivered on the bank of the river.

It is then averred "that in pursuance and part performance of said contract, said defendant did then and there furnish and deliver to plaintiff fifteen hundred sacks, of the value of one hundred dollars;" that the plaintiff after receiving said sacks proceeded to shell the corn and put it in the sacks de-

Hudnut v. Weir.

livered to him, and then delivered it in good order at the place stipulated, and notified the defendant, who refused to receive and accept the same; that the plaintiff was compelled to sell the corn at a sacrifice, and sustained damages, etc.

A demurrer was overruled to the complaint, and this ruling is assigned for error.

There being no averment in the complaint that there was a "note or memorandum in writing of the bargain," it will be presumed, following the rule in *Krohn v. Bantz*, 68 Ind. 277, that no writing was signed.

No note or memorandum in writing having been made, as required, and no part of the corn having been delivered and received under the contract, it is conceded that the contract was void, unless the fact of the delivery by the purchaser to the seller of the sacks in which to deliver the corn took it out of the statute.

Where no written memorandum is signed by the party to be charged, and no part of the property sold is delivered, then, in order that the contract may not fall within the statute, it is necessary that the party alleging it shall furnish unequivocal proof that something of value was delivered to the seller, either "in earnest, to bind the bargain, or in part payment" of the price to be paid for the property which was the subject of the alleged contract.

The giving of something of value as "earnest," or the part payment of the price, are considered as facts, independent of the contract, which are susceptible of parol proof, and when the proof of either is added to the parol proof of the contract, it is regarded as a sufficient safeguard, so as to admit of the dispensing with the other requirements of the statute. 1 Benj. Sales, section 189.

It was said in the case of *Howe v. Hayward*, 108 Mass. 54 (11 Am. R. 306), that, "As used in the statute of frauds, 'earnest' is regarded as a part payment of the price," and it was held in that case, as also by this court in *Noakes v. Morcy*, 30 Ind. 103, that a check delivered as a forfeiture, in a case

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of non-performance, was neither part payment nor earnest, and so, too, it was held in *Krohn v. Bantz*, *supra*, that where the purchaser delivered his note, not governed by the law merchant, it would not be regarded either as part payment or earnest.

The contract as it is averred in the complaint in this case is, that the "defendant agreed to pay the sum of fifty cents per bushel for said lot of corn," and as a "part of the consideration for said sale, the defendant agreed to furnish the sacks in which to put said corn." It is then averred that "in pursuance and in part performance of said contract," the defendant delivered the sacks.

The substance of the transaction as the complaint exhibits it is, the appellant purchased the appellee's corn at a stipulated price, and agreed to furnish his own sacks to the seller in which to deliver it. In pursuance of this agreement he delivered the fifteen hundred sacks which were to be returned to him with the corn. We think it can not be said that this was a part payment of the price of the corn. At section 194 of 1 Benjamin on Sales, it is said: "There seems, therefore, no reason to doubt that the part payment required by the statute of frauds as an act in addition to the parol contract, in order to make a sale good, need not be made in money, but that anything of value which by mutual agreement is given by the buyer and accepted by the seller 'on account' or in part satisfaction of the price will be equivalent to part payment."

The sacks continued the property of the appellant after, the same as before, they were delivered to the seller. The appellee took no property in them, nor other right, except to fill them with corn and return them.

A learned court has said: "The statute of frauds has been pronounced by high authority (Kent's Comm., 2 V., 494), to be, in many respects, the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights. Its benefits it is believed will be most effectually secured, by rejecting refined distinctions, overlook-

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ing the supposed equity of particular cases, and adhering steadily to its language as the best exponent of the intention of the legislature." *Shindler v. Houston*, 1 Coms. (N. Y.) 261.

We are of opinion that the demurrer to the complaint should have been sustained.

Judgment reversed, with costs, with directions to proceed according to this opinion.

Filed Feb. 14, 1885.

 No. 11,536.

ELWOOD v. BEYMER ET AL.

FORMER ADJUDICATION.—*Sufficiency of Answer.*—*Partition.*—*Demurrer.*—

Where a defendant, in an action for the partition of land, files a cross complaint setting up certain equitable liens on the land for improvements made, taxes paid and interest thereon, an answer, stating in substance that the matters alleged in such cross complaint were or might have been litigated in a former suit for the partition of the same land, between substantially the same parties, claiming respectively the same shares by the same title as in the pending action, is good on demurrer as an answer of former adjudication, in bar of such action.

From the Grant Circuit Court.

J. A. Kersey and *L. D. Baldwin*, for appellant.

B. G. Shinn, *J. Noonan* and *H. Brownlee*, for appellees.

Howk, J.—The appellees, Catharine and Sealy Beymer, commenced this suit against the appellant, Vashti Elwood, and Jane and John Boxell, and one Trelawney Camblin, who is named as one of the appellees in this court, to obtain the partition of certain real estate, particularly described, in Grant county. In her complaint the appellee Catharine Beymer alleged that she and the defendants to her suit were the owners of such real estate, as the widow and heirs at law of one Thomas G. Elwood, deceased, who died in or about the year 1861, seized in fee of the real estate in controversy herein, and, also, of another described parcel of land in Grant county;

100	504
126	384
300	504
128	576
128	607
100	504
141	584
146	7
100	504
156	570

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that, at his death, Thomas G. Elwood left the appellant, Vashti Elwood, as his widow, and Jane Boxell, George W., David R., Newton, John, Eugene and Phœbe C. Elwood, his children, as his only heirs at law; that afterwards Eugene Elwood died intestate, and without issue, and thereupon the real estate descended and became vested as follows: An undivided one-third in appellant Vashti, and an undivided one-ninth each in Jane Boxell, George W., David R., Newton, John and Phœbe C. Elwood; that George W. Elwood died intestate in 1863, leaving the appellee Catharine Beymer as his widow and sole heir at law, and to whom his entire interest in such real estate descended, as his whole estate, real and personal, was of less value than one thousand dollars; that afterwards David R. Elwood purchased and became the owner of the shares of Newton and John Elwood in such real estate, and then had his entire interest in the land, being then the undivided one-third part thereof, set off to him in severalty, in a partition suit instituted by him in the court below, at its September term, 1878; that thereupon the residue of the real estate, now in controversy, vested as follows: An undivided one-half part in the appellant Vashti Elwood, and an undivided one-sixth part each in Jane Boxell, appellee Catharine Beymer, and Phœbe C., who afterwards married the appellee Trelawney Camblin, and died, leaving him, Trelawney, as her surviving husband and sole heir at law, to whom her interest in such real estate descended. Wherefore the appellee Catharine Beymer prayed for partition, etc.

The cause was put at issue and tried by the court, and a finding was made, in substance, as follows: 1. Appellant, Vashti Elwood, for improvements made and taxes paid on the real estate in controversy, was entitled to have \$168.12 in value thereof set off to her, and was then entitled to have two-thirds of the residue of the real estate also set off to her. 2. Appellees Catharine Beymer and Trelawney Camblin were each entitled to the one-sixth part of such residue of the real estate. The commissioners appointed to make such partition

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reported to the court that the real estate could not be divided without damage to the owners. Thereupon it was ordered and adjudged that the land be sold, and a commissioner was appointed by the court to make such sale. Appellant's motion for a new trial having been overruled, she has appealed to this court.

In their brief of this cause the appellant's counsel say: "The principal errors relied upon for the reversal of the judgment are the overruling of appellant's demurrer to appellees' answer to her cross complaint, and the overruling of her motion for a new trial." These are the only alleged errors of which mention is made in their brief, and the only errors which we find it necessary to notice in this opinion.

In her cross complaint the appellant stated the ownership of the real estate by her deceased husband, Thomas G. Elwood, and the descent and inheritance thereof, substantially as the same are alleged in appellees' complaint. She then alleged that at the death of her husband, in 1861, the real estate was not worth more than \$1,500, and his personal estate did not exceed \$300 in value, and he was indebted in the sum of \$300; that there was never any administration upon his estate, but appellant paid the indebtedness of his estate out of her own means; that after deducting such indebtedness and appellant's one-third interest, the value of the share of each of the surviving children, in his entire estate, was \$150; that George W. Elwood, the deceased husband of the appellee Catharine Beymer, through whom she claimed title in her complaint, received from his father, Thomas G. Elwood, by way of an advancement in 1860, one horse worth \$75; that he and appellee Catharine, then his wife, became indebted to the appellant in the sum of \$237; and that after the death of George W. Elwood appellee Catharine became indebted to appellant in the sum of \$425, bills of particulars of each of which sums were filed with the cross complaint. Appellant also alleged that her daughter, Phœbe C. Camblin, through whom appellee Trelawney Camblin claimed title to one-sixth

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of the real estate, became indebted to appellant in the sum of \$380 before her marriage to Trelawney, and in the further sum of \$65 after such marriage, of which sums bills of particulars were filed with the cross complaint. Appellant further averred that the indebtedness of George W. Elwood and appellee Catharine, as aforesaid, was incurred by them more than twenty years before the commencement of this suit, and was largely in excess of the value of the share which appellee Catharine claimed in the real estate; and that for more than twenty years the appellant held and owned the share of George W. Elwood in the real estate, adversely to him while he lived, and to the appellee Catharine as his heir, since his death; that by reason of the indebtedness as aforesaid of the appellee Catharine, and of Phœbe C. and Trelawney Camblin, the appellant had and held good and valid equitable liens on any and all interest of the appellee Catharine and of the appellee Trelawney in the real estate in controversy; and that appellant then held possession of such real estate by virtue of the liens aforesaid, in addition to her claim by twenty years' possession, and that she ought to have her said claims out of any interest the appellees Catharine and Trelawney, or either of them, might have in such real estate. Wherefore, etc.

In an additional paragraph of cross complaint the appellant alleged that for more than twenty years prior to the commencement of this suit, she and Jane Boxell had and held open, notorious and uninterrupted possession of the real estate in controversy, claiming title thereto, to the entire exclusion of and adversely to the appellees; that they had no right to, nor interest in, such real estate, and that their pretended claim for partition was a cloud upon appellant's title. Wherefore, etc.

The appellees Catharine Beymer and Trelawney Camblin jointly answered appellant's cross complaint, and said that at the September term, 1878, of the court below, David R. Elwood filed his complaint against appellant, Vashti Elwood, Jane and John Boxell, appellees Catharine and Sealy Bey-

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mer and Phœbe C. Elwood, for the partition of eighty acres of land, of which the real estate now in controversy was a part; that, in his complaint, David R. Elwood alleged that he was the owner of one-third in value, appellant Vashti was the owner of one-third in value, and that Jane Boxell, appellee Catharine and Phœbe C. Elwood were each the owner of one-ninth in value of the eighty acres of land; that the court below had competent jurisdiction of the persons of the parties to, and of the subject-matter of, such action; and that said David R. Elwood asked that his share of the eighty acres of land be set off to him in severalty; that such cause coming on for trial, it was agreed in writing by the parties to the suit, and found and adjudged by the court, that David R. Elwood and appellant were each the owner of one-third, and Jane Boxell, Catharine Beymer and Phœbe C. Elwood were each the owner of one-ninth of the eighty acres of land, and that the share of David R. Elwood be set off to him in severalty; and that commissioners were duly appointed to make such partition, which they did and made report thereof to the court, and such report was approved and confirmed by the court; that such judgment of partition had never been appealed from, but remained in full force and effect.

And the appellees averred that, by the terms of such judgment, appellant Vashti was adjudged to be the owner of one-half, and the appellee Catharine and Phœbe C. Elwood were each adjudged to be the owner of one-sixth of the real estate now in controversy; that since the rendition of such judgment, Phœbe C. Elwood had intermarried with appellee Trelawney Camblin, and had died without issue, leaving Trelawney her only heir, her interest in such real estate being of less value than \$1,000; wherefore the appellees said that all matters of improvements, taxes paid and interest upon such real estate, prior to the commencement of that suit, had been fully determined and adjudicated; that appellant Vashti had acquired no title to nor interest in such real estate since the rendition of such judgment; and that the ap-

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pellees, and those under whom they claim, were each adjudged to be the owner of an undivided one-sixth part of such real estate, and that they still owned such interest therein.

It is earnestly insisted on behalf of the appellant, that the trial court erred in overruling her demurrer to this answer to her cross complaint, and this ruling of the court presents for our decision the controlling question in this case. Is the answer good as a plea of former adjudication? Does it show that the matters stated by appellant in her cross complaint were or might have been litigated in the former suit for the partition of the same land, between substantially the same parties, claiming respectively the same shares by the same title, as in the case in hand? Under the decisions of this court, from its earliest organization down, there would seem to be but one answer to the first of these questions, and this, for the reason suggested in the second question, namely, that matters pleaded by appellant, in her cross complaint, might have been litigated in the former suit mentioned in appellees' answer. Sixty years ago, in *Fischli v. Fischli*, 1 Blackf. 360, this court said: "Whenever a matter is adjudicated, and finally determined by a competent tribunal, it is considered as forever at rest. This is the principle upon which the repose of society materially depends; and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only embraces what actually was determined, but also extends to every other matter which the parties might have litigated in the case." The doctrine of the case cited, upon the point now under consideration, is the recognized law of this State, and has been approved and followed, without doubt or question, in many of the more recent decisions of this court. *Richardson v. Jones*, 58 Ind. 240; *Kramer v. Matthews*, 68 Ind. 172; *Green v. Glynn*, 71 Ind. 336; *Sauer v. Twining*, 81 Ind. 366; *Ulrich v. Drischell*, 88 Ind. 354; *State, ex rel., v. Krug*, 94 Ind. 366; *Farrar v. Clark*, 97 Ind. 447.

Appellant's counsel concede, in argument, that the rule in

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this State is as we have stated it, and as it has been so long and so often declared to be, but they claim that the rule is not applicable to the case in hand, because the parties to this record were all defendants, and therefore not, as to each other, adversary parties in the former suit. It is none the less true, however, that the appellant might have filed her cross complaint in the former suit, and might then have litigated every matter which she seeks, by her cross complaint in this case, to litigate with the appellees. *Crane v. Kimmer*, 77 Ind. 215. Our conclusion is that the appellees' answer of the former adjudication was a good defence to appellant's cross complaint, and that her demurrer to such answer was correctly overruled.

The error assigned by appellant, upon the overruling of her motion for a new trial, presents questions in relation to the sufficiency of the evidence to sustain the finding, and the amount allowed appellant for improvements made and taxes paid by her, which she claims was too small. We can not disturb the finding of the court, as to either of these matters, upon the evidence.

The judgment is affirmed, with costs.

Filed Feb. 24, 1885.

No. 12,012.

PETRY v. AMBROSCHER ET AL.

INJUNCTION.—*Judgment.*—*Right of Land-Owner to Enjoin Sale of Land on Judgment against Another.*—A land-owner may maintain an injunction to prevent the sale of his land upon a judgment rendered against another person.

JUDGMENT.—*Parties.*—One who is not made a party to an action is not concluded by the judgment therein rendered.

PARTIES.—*Necessary and Proper Parties.*—*Foreclosure of Mortgage.*—*Owner of Equity of Redemption.*—Where land conveyed by mortgage is afterwards sold by the mortgagor, his vendee is a necessary party to the action to foreclose the mortgage, but the mortgagor is not, unless a personal judgment is sought against him, although he may be a proper party.

100 510
125 729
137 75

100 510
128 188✓

100 510

131 190

100 510✓

136 317

100 510

141 482

100 510

144 276

146 330

100 510

148 96

152 258

100 510

153 672

100 510

156 319

156 628

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VENDOR AND PURCHASER.—Volunteer.—Consideration.—One who has not paid a consideration for property is, as a general rule, regarded as a mere volunteer, and a mere volunteer can not secure the defeat of a lien or the overthrow of a judgment.

SAME.—Bona Fide Purchaser.—Husband and Wife.—Vendor's Lien.—Precedent Debt.—A wife who receives a conveyance of land from her husband in payment of a precedent debt, and does not change her condition on account of the conveyance, is not a *bona fide* purchaser for a valuable consideration in such a sense as to be entitled to defeat the vendor's lien of her husband's grantor for the purchase-money of the land.

From the Jay Circuit Court.

J. W. Headington and J. J. M. LaFollette, for appellant.

D. T. Taylor, J. M. Smith and T. Bailey, for appellees.

ELLIOTT, J.—The appellant alleges in his complaint that he is the owner of the real estate which is the subject of controversy in this action; that the appellee Ambrosher is the owner by assignment of a judgment and decree rendered by the Jay Circuit Court against Samuel H. and Joseph Williams, foreclosing a lien against the land; that the appellant had no notice of the lien; that an execution was issued on the judgment at the instance of Ambrosher, and that his co-appellee Colly C. Wingate, as sheriff of Jay county, is threatening to sell the land of the appellant to satisfy the judgment. The complaint prays an injunction.

An owner of property has a right to enjoin its sale upon a judgment rendered against another person. It is clear that one man's land can not be seized to pay a judgment against a person who stands to him as a stranger. *Bishop v. Moor-man*, 98 Ind. 1 (49 Am. R. 731). The appellant did not mistake the form of the remedy.

A person who is not made a party to an action is not bound by the judgment or decree, unless, indeed, he becomes a privy in contract or estate to the judgment debtor. It has often been held that the owner of land is not bound by a decree rendered in a suit to which he was not a party. This principle applies even in cases where mortgaged land has been sold, and the mortgagor, but not his grantee, is made a party to the

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suit. Where a lien is sought to be enforced against the land, the owner of the land, or equity of redemption, must be made a party, and where this is the only remedy sought, the grantor or mortgagor is not a necessary party, although it may, perhaps, be proper to make him one; but where a personal judgment is sought against the mortgagor or grantor, then he must be made a party to the action in order to obtain a judgment against him, bar his equity of redemption, or foreclose his rights. *Marvin v. Taylor*, 27 Ind. 73; *Holland v. Jones*, 9 Ind. 495; *Stevens v. Campbell*, 21 Ind. 471; *Burkham v. Beaver*, 17 Ind. 367; *Shaw v. Hoadley*, 8 Blackf. 165; 2 Jones Mort., sections 1290, 1292; Story Eq. Pl., section 197; Pomeroy Rem., sections 330, 336. We think the complaint shows that the appellant became the owner of the land before the commencement of the suit, and that he is, therefore, not necessarily concluded by the decree rendered in the suit.

The complaint is not very carefully drawn, but the remedy for uncertainty is by motion, and not demurrer, so that if more specific statements were desired, a motion to make more certain should have been addressed to the complaint.

There is, however, a fatal defect in the complaint. It is not alleged that the appellant was a purchaser for value. For anything that appears he is a mere volunteer. In order to secure the defeat of a lien and the overthrow of a judgment, the party must show that he paid a valuable consideration for the property affected by the decree. It will not be presumed in favor of such a person, that he is a *bona fide* purchaser for value, for the validity of the lien is not questioned, nor is the validity of the decree impugned in so far as it adjudicates upon the rights of the parties before the court, and, surely, a mere volunteer can not defeat the lien or secure a vacation of the decree. In a work upon equity, first given to the world more than a century ago, it was said: "But, regularly, equity is remedial only to those who come in upon an actual consideration." 1 Fonblanque Eq. (2 Am. ed.), p. 348. In a note to the text it is written: "It is certainly generally

true, that equity will not be remedial or assistant to mere volunteers." *Colman v. Sarrell*, 3 Bro. Ch. 12; *Chitty v. Parker*, 2 Vesey, 271; *Halliday v. Hudson*, 3 Vesey, 210; *Ken-nell v. Abbott*, 4 Vesey, 802; *Bunn v. Winthrop*, 1 Johns. Ch. R. 336. Judge Story, in speaking of the course of a court of equity in cases of volunteers, says: "It will not aid one against another; neither will it enforce a voluntary contract." 1 Story Eq. Juris., section 433. In his work on Pleading the same great lawyer said: "From what has been already said, the plea of a purchase for a valuable consideration can not be set up as a defence, by a party, who claims under a mere voluntary conveyance, or other voluntary title." Story Eq. Pl., section 811. Our decisions have recognized this general doctrine in very many cases, and have uniformly declared that a volunteer can take no greater rights than his grantor, and that he takes them burdened with all the equities that existed against his grantor at the time of the grant. *Mendenhall v. Treadway*, 44 Ind. 131, see auth. p. 134; *Wilson v. Wilson*, 86 Ind. 472.

The court erred in overruling the demurrer to the complaint, and the cross errors of the appellees are well assigned.

As the complaint is bad, there would have been no error in overruling the demurrer to the answer even if it had also been bad, but it was clearly good.

The questions raised by the demurrers to the replies can not be understood without giving a brief synopsis of the answer. This pleading alleges that promissory notes were executed for the purchase-money of the real estate in controversy; that these notes were assigned to David C. Baker, who brought suit on them, and sued, also, to enforce a vendor's lien; that suit was brought on the 5th day of June, 1878, and on the 18th day of that month the appellee's assignor recovered judgment against Samuel H. and Joseph Williams, the makers of the notes, and recovered, also, a decree declaring a vendor's lien; that on the 22d day of May, 1877, Samuel

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Williams and his wife conveyed the land to Elizabeth Gillum, and on the same day she executed a deed to Susanna Williams, the wife of Samuel Williams, and that no consideration was paid for either of these conveyances. It is further alleged that neither of the deeds was recorded until August 13th, 1878; that in the meantime Samuel Williams retained possession of the land and concealed the execution of the deeds for the purpose of defrauding creditors; that, at the time Baker commenced his action, he had no notice of the execution of the deeds; that in November, 1879, Baker assigned the decree and judgment to the defendant for value.

The reply avers that the land was conveyed to the wife of Samuel Williams to secure a debt which he owed her, and that she received the land in payment of that debt. This does not show that she is a *bona fide* purchaser for value in such a sense as to enable her to defeat the right of the vendor to enforce a lien for the purchase-money. It would be gross injustice to permit a man to get another's land without paying for it, and, after having got it, turn it over to his wife in payment of a precedent debt. It is clear that the vendor's is the stronger equity, and it is also prior in point of time. A precedent debt is a consideration sufficient to support a contract. *Boling v. Howell*, 93 Ind. 329, see p. 331; *Hewitt v. Powers*, 84 Ind. 295. It is not, however, such a consideration as will constitute a person a *bona fide* purchaser, with rights superior to those of the unpaid vendor of the land. It is not difficult to discriminate and plainly indicate the line between cases where a precedent debt is relied upon to support a contract between the parties, and those where it is relied upon to defeat a prior equity. *Busenbarke v. Ramey*, 53 Ind. 499; *Gilchrist v. Gough*, 63 Ind. 576; *Davis v. Newcomb*, 72 Ind. 413; *Louthain v. Miller*, 85 Ind. 161; *Durham v. Craig*, 79 Ind. 117, *vide* p. 125; *Evans v. Pence*, 78 Ind. 439, *vide* p. 440; 2 Pomeroy Eq., section 749.

Where the creditor essentially changes his position, or parts

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with a valuable security or right, then he may be deemed a *bona fide* purchaser if he buys without notice, although the consideration is an antecedent debt. But in order that this may result there must be an essential change of position, to the manifest injury of the creditor. *Boling v. Howell, supra*, see p. 337; *Fitzpatrick v. Papa*, 89 Ind. 17, see p. 19; *Gilchrist v. Gough, supra*; *Kester v. Hulman*, 65 Ind. 100; *Mayor v. Grottendick*, 68 Ind. 1. It does not appear from the reply that the creditor did essentially change her position or part with anything of value, and the case is, therefore, not within the exception to the general rule.

There are other reasons why the reply is bad, but we deem it unnecessary to discuss them.

Judgment affirmed.

Filed Feb. 14, 1885.

No. 11,456.

HARRISON, RECEIVER, v. WRIGHT ET AL.

BANK CHECKS.—*Definition.*—*Bill of Exchange.*—When properly filled out with the date, amount, the names of drawer and payee, the following is a banker's check, and not an ordinary bill of exchange: "Indianapolis, Ind., ———, 1883. No. ——. Pay to the order of ———, ——— dollars. ———, Cashier. To the United States National Bank, New York."

SAME.—*Force and Effect of Such Check.*—*Assignment.*—*Insolvent Drawer.*—*Preferred Creditor.*—Such a check, drawn upon the drawer's banker, without words of transfer, and drawn upon no particular designated fund, does not, of itself, either as between the drawer and drawee, or drawer and payee or holder of the check, operate as an appropriation or equitable assignment of a fund in the hands of the drawee. Nor does it operate as an assignment of a part of the drawer's chose in action against the drawee; and hence the holder of such a check is not entitled to a preference as against the depositors and general creditors of an insolvent drawer. For the reasons upon which this ruling is based, and an extended review of the authorities, see the opinion.

From the Marion Superior Court.

100	515
137	477
100	515
145	505
146	366
100	515
153	52

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S. Claypool, W. A. Ketcham, B. Harrison, C. C. Hines, W. H. H. Miller and J. B. Elam, for appellant.

T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, T. L. Sullivan, A. Q. Jones, C. A. Dryer, L. Howland, C. Byfield and M. Moores, for appellees.

ZOLLARS, C. J.—The Indiana Banking Company, a partnership engaged in the business of banking, suspended payment on the morning of August 10th, 1883.

At the time of the suspension, there were outstanding checks or drafts drawn by the banking company in favor of various parties, and upon different banks in different cities. These drafts had been drawn at different dates, ranging from the preceding April, up to and on the day preceding the suspension. Some of these check-holders were depositors with the Indiana Banking Company, and purchased the checks, by checks upon their deposits in the bank. Others, who were not depositors, paid the cash for their checks. Some of the checks, too, were given for collections made by the banking company for the payees named therein.

At the time of the suspension, the Indiana Banking Company had sufficient funds in each of the banks to meet all checks drawn upon it, except the United States National Bank of New York. To supply this bank with funds to meet the checks upon it, the Indiana Banking Company made checks in its favor upon banks in Baltimore and Philadelphia, and forwarded them to it for credit, on the evening before the suspension. These banks held sufficient funds of the Indiana Banking Company, and if they had paid the checks, sufficient funds would have gone in the usual course of mail to the New York bank to have met all checks drawn upon it.

Upon hearing of the failure of the Indiana Banking Company, the Baltimore and Philadelphia banks declined to pay these checks, and yet hold the funds, subject to the order of the Indiana Banking Company, or its receiver.

At the time of the suspension, the New York bank had

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some funds of the Indiana Banking Company, and paid them out upon its checks. After these funds were thus exhausted and the Baltimore and Philadelphia banks refused to pay, the New York bank returned the checks in its favor to the receiver of the Indiana Banking Company. All of the checks were duly presented to the banks upon which they were drawn within a reasonable time after the failure of the Indiana Banking Company. This company issued the several checks in the usual course of business, the managers hoping and believing until the morning of the 10th of August, that they would be able to maintain its credit, and go on with the business of the bank.

The assets of the Indiana Banking Company have passed to the receiver herein, appointed by the court, and he is charged with the duty of settling its affairs. The assets are not sufficient to pay the depositors and other debts in full.

The check-holders claim that they should be preferred, and paid in full, and thus they make an issue with the general creditors. The receiver commenced this action to have an adjudication of the rights of these several parties. Differing only as to amounts, the number and date, the names of payees, and the names of the drawees (banks), the checks were as follows:

" No. —. INDIANAPOLIS, IND., —, 1883.

" Pay to the order of _____,
_____ Dollars.

" _____, Cashier.

"To the United States National Bank, New York."

The contention of the check-holders is: *First*. That the checks are ordinary bankers' checks, and that the drawing and delivery of them operated as an equitable assignment to them, *pro tanto*, of the funds of the Indiana Banking Company in the hands of the drawees; and, *Second*. That whether this is so or not, to the extent of making the drawees liable to the payees, they operated as an equitable assignment as between the Indiana Banking Company and the payees of the

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checks, and, as the receiver takes the place of the bank in this regard, that equity should be enforced against him, and they be paid in full.

Some of the cases hold to this distinction, while others disregard it. For convenience, we group the cases into three classes:

First. A class which holds that the drawing and delivering of a check do not operate as an assignment, in any sense, of the drawer's rights against the drawee, nor of the funds upon which it is drawn, nor give the payee or holder any rights as against the drawee, unless, in some way, the check is accepted by such drawee; and that hence, as between the drawer and payee or holder, the check does not operate as an assignment of the fund drawn upon, or of the drawer's rights as against the drawee.

Second. Another class of cases holds that the drawing and delivery of a check operate as an equitable assignment, *pro tanto*, of the fund in the hands of the drawees, and give the holder the right to collect from the drawee by suit. These cases, of course, hold, also, that a check operates as an assignment as between the drawer and payee.

Third. Another class seems to hold that whether a check has this effect or not, it operates as an equitable assignment as between the drawer and payee.

On account of the diversity of rulings by the different courts, and the diverse reasons upon which they are founded, the importance of the questions involved, and the fact that a decision of this court is assailed, it seems necessary that we should examine the theories advanced by either side in this case, and the rulings by other courts. Thus far we have used the term "check" in speaking of the papers issued by the Indiana Banking Company. It is contended, however, by the appellant, that they are not checks, but ordinary bills of exchange. Here, again, the cases and the law-writers are in sharp conflict. We think that upon the weight of authority, and the better reason, the papers issued by the Indiana Bank-

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ing Company should be considered and held to be banker's checks, drawn by one bank upon another bank. In the case of *Griffin v. Kemp*, 46 Ind. 172, in speaking of checks, this court said: "A check is defined to be a written order, or request, addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person * * * a certain sum of money specified in the instrument. It has been said that checks have many resemblances to bills of exchange, and are, in many respects, governed by the same rules and principles as the latter. But *nullum simile est idem*, and their nature, obligation, and character are in some respects different from those of common bills of exchange. The circumstances in which they principally differ from bills of exchange, or at least from bills of exchange in ordinary use and circulation, are: 1st. They are always drawn on a bank, or on bankers, and are payable on presentment without any days of grace. 2d. They require no acceptance as distinct from prompt payment. 3d. They are always supposed to be drawn upon a previous deposit of funds. * * * A check so far differs from a bill of exchange or note, that its payment may be countermanded by the drawer before it is accepted or paid by the bank."

In the case of *Henshaw v. Root*, 60 Ind. 220, it was said that delay in giving notice of non-payment does not discharge the drawer of a check from liability, unless damage results from such delay, and then only to the extent of the damages sustained. This of course is not true of a bill of exchange. *Purcell v. Allemong*, 22 Grat. 739.

In the case of *First Nat'l Bank of Cincinnati v. Coates*, 3 McCrary, 9, it was held that a draft by one bank upon another bank is a check, though it is apparent on its face that the drawer and drawee are residents of different States.

In the case of *Rosenthal v. Mastin Bank*, 17 Blatchf. 318, a draft by a bank in Missouri on a bank in New York was treated as a banker's check. See, also, *Moses v. Franklin*

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Bank of Baltimore, 34 Md. 574; *Planters' Bank v. Keese*, 7 Heisk. (Tenn.) 200; *Planters' Bank v. Merritt*, 7 Heisk. 177; *Lester & Co. v. Given, Jones & Co.*, 8 Bush (Ky.) 357.

FIRST CLASS.

Treating these checks, as such, did the simple issuing and delivery of them, under the circumstances, without further agreement, operate as an equitable assignment of the funds drawn upon, as between the payees and drawees, or give the payees any right of action against the drawees? It was held by this court, in the case of *Nat'l Bank of Rockville v. Second Nat'l Bank of Lafayette*, 69 Ind. 479 (35 Am. R. 236), that the payee of a bank check can not maintain an action against the drawee, unless the check has been accepted by the drawee. This is the case assailed by appellees, the holders and payees of the checks. The conclusion reached in the case is sustained by the earlier case of *Griffin v. Kemp*, 46 Ind. 172, where it was said: "Although there are cases to the contrary, it seems clear upon principle and by the great weight of authority, that the holder of a check can not sue the bank for refusing payment, in the absence of proof that the check was accepted by the bank, or the amount thereof charged against the drawer." It is also in accordance with the rulings of the English courts, and the Supreme Courts of the United States, Louisiana, New York, Massachusetts, Pennsylvania, Michigan, Tennessee, Virginia, New Jersey, Missouri, most of the United States circuit and district courts, Parsons on Notes and Bills, Morse on Banks and Banking, Grant on Banking, and all of the law-writers, as we now recollect, except Mr. Daniel in his work on Negotiable Instruments.

The case of *Griffin v. Kemp*, *supra*, was based upon the case of the *Bank of the Republic v. Millard*, 10 Wall. 152, which seems to be treated as a leading case, partly, perhaps, on account of the high authority from which it emanates. That was an action by the payee of an unaccepted bank check

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against the bank upon which it was drawn, and it was held that he could not recover.

The court said: "As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status, which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. * * * * The right of the depositor, as was said by an eminent judge, is a chose in action, and his check does not transfer the debt, or give a lien upon it to a third person without the assent of the depositary."

It was said further, that the relation between the depositor and depositary is that of creditor and debtor; that the money deposited becomes the money of the depositary, to be used

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and loaned as its own, as it may choose; that the contract is purely a legal one, without any element of trust whatever. It was said further, that it may be, that if it could be shown that the depositary has charged the depositor with the amount of the check, the payee might recover, as for money had and received.

The case of *First Nat'l Bank, etc., v. Whitman*, 94 U. S. 343, was an action by the payee of a check against the depositary. The reasoning in the above case was adopted.

In the case of *Case v. Henderson*, 23 La. An. 49 (8 Am. R. 590), it was held that the payee and holder of a check upon a bank could not set it off against a note which the bank held against him. The decision is based upon the case of *Bank of the Republic v. Millard*, *supra*.

The case of *Dykens v. Leather Manufacturers' Bank*, 11 Paige, 612, was an action by the check-holder against the bank upon which it was drawn. It was held by the chancellor that he could not recover. After the check was drawn and delivered to the payee, the drawer notified the bank not to pay it, and after the payee had demanded payment of the bank the drawer withdrew his deposits. It was said that priority of a check does not entitle the holder to priority of payment, and that when several checks are drawn on a deposit, the bank is not bound to settle priorities; that it would be impossible for banks to do business if they were bound to settle conflicting claims of check-holders; that at any time before acceptance and payment the drawer may countermand the check; that the drawing and delivery of a check do not operate as a specific appropriation, *pro tanto*, of the fund upon which it is drawn, to the exclusion of subsequent checks, and that the rule as to the assignment of particular funds can not be applied to checks. The ruling has been adhered to in the State of New York. See *Chapman v. White*, 2 Seld. 412; *Risley v. Phenix Bank*, 83 N. Y. 318 (38 Am. R. 421); *Duncan v. Berlin*, 60 N. Y. 151; *People v. Merchants, etc., Bank*, 78 N. Y. 269 (34 Am. R. 532).

The case of *Carr v. Nat'l Security Bank*, 107 Mass. 45 (9 Am.

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R. 6), was an action by the holder of a check against the drawee. It was based in part upon a special agreement by the bank with the depositor, to pay all checks that he might draw upon it to the extent of the fund deposited. It was held that the relation between the depositor and bank was that of creditor and debtor, and not of principal and agent, or trustee and *cestui que trust*; that the check did not operate to transfer any interest in the fund, either legal or equitable; that while the dishonor of the check would render the bank liable to the drawer, the payee could not maintain an action against it, and that the general agreement of the bank to pay all checks drawn upon it by the depositor could not be taken advantage of by the check-holders as a promise made for their benefit, because, when the promise was made, it was not known who the check-holders would be, nor the amount of the checks they might hold.

In the case of *Loyd v. McCaffrey*, 46 Pa. St. 410, it was held that a check upon a banker is not, of itself, an appropriation of the funds in his hands belonging to the drawer, unless it plainly appears that the fund claimed was the one designated, out of which payment was to be made; and that an agreement between the drawer, payee and banker, that if an attachment was levied on the drawer's funds, the check should at once be passed to the credit of the payee, and charged to the drawer, did not amount to an assignment, or raise a trust in favor of the payee; nor was it a present appropriation of the money.

In the case of *Second Nat'l Bank, etc., v. Williams*, 13 Mich. 282, it was held that without acceptance by the bank, or some special undertaking on its part, the bank could not be held liable upon a check, even though drawn for the full amount of the deposit; that in such case there is no privity between the payee and drawee; that the only remedy of the former is against the drawer, and that the payee does not take an unaccepted check, relying upon the credit of the drawee, but upon that of the drawer.

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The Supreme Court of Tennessee, in the case of *Planters' Bank v. Merritt*, *supra*, approved of the ruling in *Bank of the Republic v. Millard*, *supra*, and held that the holder and payee of a check or draft, drawn by a bank in Tennessee upon a bank in New Orleans, had no right of action on the check against the New Orleans bank.

In the case of *Moses v. Franklin Bank of Baltimore*, 34 Md. 574, it was held that a check does not operate as an assignment, *pro tanto*, of the fund upon which it is drawn, until it is accepted, or certified to be good by the bank holding the funds; that the bank upon which it is drawn can not be held liable to the payee on the check itself; that the obligation of the bank upon which a check is drawn by a depositor to accept and pay, is not to the holder of the check, but to the drawer, and that, therefore, the bank is bound to obey the instructions of the drawer not to pay. See, also, *Purcell v. Allemon*, 22 Grat. (Va.) 739. Also U. S. Circuit Courts: *Essex County Nat'l Bank v. Bank of Montreal*, 7 Bissell, 193; *A. & R. Strain v. Courdin*, 11 Nat'l Bk. Reg. 156; *Rosenthal v. Mastin Bank*, *supra*; *German Savings Institution v. Adae*, 1 McCrary, 501.

Mr. Morse, in his work on Banks and Banking, at page 275, says: "A check which has not been accepted by the bank on which it is drawn, does not operate as an assignment to the payee of the sum for which it is given." Parsons, in his work on Notes and Bills, vol. 2, p. 60, *et seq.*, states the same rule, and cites numerous cases in support of it, among them English cases.

In the case of *Hopkinson v. Forster*, Law R. 19 Eq. C. 74, it was held by the English court that a check is clearly not an assignment of money in the hands of a banker, and that a banker who dishonors it is not liable to a suit in equity by the holder. See, also, *Bellamy v. Majoribanks*, 8 Eng. L. & Eq. 513; *Creveling v. Bloomsbury Nat'l Bank*, 46 N. J. L. 255; S. C., 31 Albany L. J. 60. Many other cases to the same effect might be cited. The same rule has been applied to bills

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of exchange. 1 Parsons Notes and Bills, pp. 330-1; *Bank of Commerce v. Bogy*, 44 Mo. 1; *Kimball v. Donald*, 20 Mo. 577; *Jones v. Pacific Wood, etc., Co.*, 13 Nev. 359 (29 Am. R. 308); *Hopkins v. Beebe*, 26 Pa. St. 85; *Wheeler v. Stone*, 4 Gill (Md.) 38; *Bush v. Foote*, 58 Miss. 5 (38 Am. R. 310); *Sands & Co. v. Matthews, Finley & Co.*, 27 Ala. 399; *First Nat'l Bank, etc., v. Dubuque, etc., R. W. Co.*, 52 Iowa, 378 (35 Am. R. 280).

Of course there is a difference between bank checks and bills of exchange, as we have seen, but there is enough similarity to make the adjudications upon one of some weight upon the other.

In accord with these cases are the cases holding that a check does not operate as an assignment as between the drawer and payee, or in any way give the payee or holder of the check a preference as against the general creditors of the drawer.

The facts in the case of *People v. Merchants, etc., Bank*, 78 N. Y. 269, were as follows: A. gave a check upon a bank in Troy, in which he was a depositor. The check became the property of a bank in New York, which forwarded it to the Troy bank for payment. The Troy bank charged the depositor with the amount, returned the check to him as paid, and forwarded to the New York bank a check or draft for the amount upon another New York bank. This check was not paid, and the Troy bank passed into the hands of a receiver. The New York bank, holding the unpaid check, petitioned to have the receiver pay the check in full. The court held that this should not be done, and placed the holding on the ground that the relation of the depositor and depository is that of creditor and debtor, and that by the action of the Troy bank it became simply the debtor of the bank holding the check, without any element of trust, and that by accepting the check, instead of the cash, the New York bank trusted the Troy bank.

The case of *Attorney General v. Continental L. Ins. Co.*, 71 N. Y. 325 (27 Am. R. 55), was an action by the payee of a

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check to have the receiver of the drawer pay the check in full, on the ground that as between the drawer and payee, the check operated as an equitable assignment. It was held that this could not be allowed. The ruling was placed substantially on the same ground as the case last above, with the additional reason, that such a holding is indispensably necessary to the safe transaction of commercial business. See, also, *Lunt v. Bank of North America*, 49 Barb. 221.

The facts in the recent case of *Grammel v. Carmer*, 19 Cent. L. J. 492, was as follows: A banker in Michigan sold a draft or check on a bank in New York, and before it was presented for payment made an assignment for the benefit of creditors. Payment was refused by the New York bank on account of the assignment. The action was by the payee of the check to have the assignee pay the check in full, on the ground that as between the drawer and payee it operated as an equitable assignment. It was held by the court, COOLEY, C. J., delivering the opinion (SHERWOOD dissenting), that the payee and holder of the check was not entitled to such preference.

The facts in the recent case of *Dickinson v. Coates*, 79 Mo. 250 (49 Am. R. 228), were as follows: The Mastin Bank of Kansas City drew a check or draft upon a New York bank, and before it was presented for payment made an assignment for the benefit of creditors. The assignee drew the funds from the New York bank. The action was against him to have the check paid in full, on the theory that the check worked an equitable assignment, and hence the assignee held the fund for the use of the holder of the checks. The decision was adverse to this claim, and was based upon the ground that the relation of the depositor and depository was that of creditor and debtor, and that the check was not for the whole of the fund, nor for any particular fund, and contained no terms of transfer, and hence, before acceptance, did not work an equitable assignment. In a case that grew out of the failure of the same bank, and upon a state of facts, in all essentials, identical with the facts in the case last above, the same ruling was made by the U. S. Cir-

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cuit in New York, by BLATCHFORD, J. *Rosenthal v. Mastin Bank, supra.* The same ruling was made in the case of *Winter v. Drury*, 1 Seld. 525. The same doctrine has been applied to bills of exchange.

It will be noticed, upon an examination of these cases and others holding the same doctrine, that they are, in the main, based upon the ground, that because the check does not operate as an equitable assignment as between the payee and the drawee, it does not as between the drawer and payee, and hence does not entitle the payee or holder to a preference. The case of *Coats v. First Nat'l Bank of Emporia*, 91 N. Y. 20, is not in conflict with these cases. Recognizing the doctrine of former cases, it was held that the transaction showed, as it did, that there was an intention to transfer, and a transfer, of the fund.

SECOND CLASS OF CASES.

The case of *Munn v. Burch*, 25 Ill. 21, was an action by a check-holder against the bank upon which it was drawn. It was held that he could recover, and that upon presentation of the check, both the legal and equitable right to the money of the drawer in the hands of the bank passed to him. In the course of the opinion it was said, that upon receiving the deposit the bank impliedly agrees with the depositor to pay it out on the presentation of his checks, in such sums as those checks may call for, "and with the whole world he agrees that whoever shall become the owner of such check, shall, upon presentation, thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit." It is said further: "Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker, on one side, and the receiving of the check for value and presenting it, on the other." And still further: "It is a familiar principle of daily illustration, that a promise made to the public that the performance of a par-

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ticular act shall entitle the person performing the act to a particular right, is a valid assumpsit to such person." See *Fourth Nat'l Bank of Chicago v. City Nat'l Bank of Grand Rapids*, 68 Ill. 398; *Chicago Marine, etc., Ins. Co. v. Stanford*, 28 Ill. 168; *Union Nat'l Bank v. Oceana County Bank*, 80 Ill. 212 (22 Am. R. 185). In this case it was further held, that after the check has passed to the hands of a *bona fide* holder, it is not in the power of the drawer to countermand the order of payment. See, also, *Brown v. Leckie*, 43 Ill. 497.

In the case of *Fogarties & Stillman v. The State Bank*, 12 Rich. (S. C.) 518, the same ruling was made, and upon substantially the same ground as in the Illinois cases. In the case of *Lester & Co. v. Given, Jones & Co.*, 8 Bush (Ky.) 357, it was held that the payee of a check drawn in Kentucky upon a bank in New York could maintain an action against the bank, upon the ground that the check operated as an absolute appropriation of so much money in the hands of the drawee. The reasoning of the court seems to place a bank check upon the same basis as an order drawn upon a particular fund in the hands of the drawee.

In the case of *Weinstock v. Bellwood*, 12 Bush, 139, this case was interpreted as holding, "that the bank held the money as the mere bailee of the depositor."

Distinguishing a check from a bill of exchange, and placing the ruling upon substantially the same ground as in the Illinois cases, it was held in the case of *Roberts v. Austin Corbin & Co.*, 26 Iowa, 315, that the payee or holder of a check may recover the amount of it from the drawee.

In the cases of *McGrade v. German Savings Institution*, 4 Mo. App. 330, and *Senter v. Continental Bank*, 7 Mo. App. 532, after holding that the relation of the depositor and depositary is that of creditor and debtor, that the original deposit in a strictly legal effect is a loan to the bank, and every payment a repayment of the loan *pro tanto*, it was held that the holder of the check could recover on the ground, that upon the presentation of a check, the holder is brought into privity

with the depositary by force of an implied agreement on the part of the depositary to pay the depositor's checks, and this, regardless of the fact, that at the time of the deposit, the names of the check-holders and the amounts of their check are unknown; and further, that when the checks are presented for payment they operate an absolute appropriation of the fund drawn upon, and can not be countermanded by the drawer. It should be observed that these cases, as authority in Missouri, are overthrown by the later case by the Supreme Court of that State. *Dickinson v. Coates, supra.* Thus we have the Supreme courts of Illinois, Kentucky, Iowa and South Carolina arrayed against the cases examined under the first class. The conflict between these classes of cases is irreconcilable. And there is a want of harmony as to the grounds upon which the conclusions in each class are based. It is evident that much of the confusion is the result of a failure to properly observe the distinction between legal and equitable rights, legal and equitable remedies, and the innovations by modern statutes. Some of the cases in the first are purely cases at law. The reasons upon which the first class of cases are grounded may be summarized as follows:

1st. The relation between the depositor and depositary is that of creditor and debtor, without any element of trust, and the right of the depositor is a chose in action, which is not transferred or subjected to a lien by the giving of a check, unless assented to by the drawee by accepting the check, or otherwise.

2d. The depositary can not be subjected to different actions by different check-holders, because he has the right to insist upon a single payment of the deposit.

3d. A part of a chose in action can not be assigned.

4th. A check, not being drawn upon a particular fund, does not work an assignment.

5th. There is no foundation for an action by the holder of

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a check, because there is no privity of contract between him and the drawee.

6th. If the holder can maintain an action against the drawee, there would be a right of action upon one promise, for the same thing, in two persons at the same time, the payee and drawer.

7th. If a check works an assignment as against the drawee, he would be compelled to pay, although the deposit might be exhausted by subsequent checks.

8th. The holder of the check can not take advantage of the implied promise to pay the depositor's checks, because, at the time the deposit is made, neither the name of the holder nor the amount of his check is known.

9th. Priority of checks does not entitle the holder to a priority of payment. Banks are not bound to settle conflicting claims of check-holders, and could not transact their business if compelled to do so.

10th. Checks may be countermanded at any time before acceptance or payment, and this could not be so if they operated as an equitable assignment.

11th. In the absence of any evidence, except what the check furnishes, it must be presumed that the payee takes the check upon the credit of the drawer.

Let us examine these reasons in the order above:

1st. That the bank does not hold an ordinary deposit as trustee, but by the deposit becomes the debtor of the depositor simply, and may use the money as it pleases, is well settled by authority. With one or two exceptions, all of the above cases either concede or assert this. It is the doctrine of this court. *Coffin v. Anderson*, 4 Blackf. 395; *State, ex rel., v. Clark*, 4 Ind. 315. See *Morse Banking*, 28, and the numerous cases there cited.

2d and 3d. The rule that a chose in action, or part of a chose in action, can not be assigned, is the rule of law, but it is not the rule in equity, and still less is it the rule under modern statutes, which, as in this State, expressly authorize

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the assignments of choses in action, and direct that all actions shall be prosecuted in the name of the real party in interest. Under these statutes, no good reason is apparent why the assignee may not maintain an action at law. Pomeroy Eq., section 1277. But however that may be, in a case where the proceeding is clearly in equity, as here, all interested parties being before the court, there can be no doubt that an assignment of a part of a chose in action, or fund, if really made, will be upheld and enforced, whether the debtor has assented thereto or not. *McFadden v. Wilson*, 96 Ind. 253, and cases there cited; *Wood v. Wallace*, 24 Ind. 226; Pomeroy Eq., section 1270, *et seq.*, and cases there cited.

In Story's Equity Jurisprudence, section 1044, it is said, after stating the rule at law: "But in cases of this sort, the transaction will have a very different operation in equity. Thus, for instance, if A., having a debt due to him from B., should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of a part of such debt. In each case, a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it." It may be added, too, that the depositary bank is not in a position to make the point that the depositor's claim against it should not be called for in parts, as its implied contract with the depositors is to thus pay, at his pleasure. If, therefore, these reasons were the only ones against an equitable assignment by a check, they clearly would not be sufficient in equity and under our statutes.

4th and 5th. When it is once conceded that there may be an assignment of a chose in action, or of a fund, the argument of want of privity between the assignee and debtor or holder of the fund is disposed of, under the equitable and statutory rules.

If, by the assignment, the assignee acquires a legal right, it is by force of the statute, without regard to the assent of

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the debtor or holder of the fund. If he acquires an equitable assignment or right simply, under the rules in equity, this right is independent of any assent by the debtor or holder of the fund. After stating the rule at law as to the necessity of privity of contract, Mr. Pomeroy says: "The doctrine of equity is very different. Equity recognizes an interest in the fund, in the nature of an equitable property, obtained through the assignment, or the order which operates as an assignment, and permits such interest to be enforced by an action, even though the debtor or depositary has not assented to the transfer. It is an established doctrine, that an equitable assignment of a specific fund in the hands of a third person, creates an equitable property in such fund. If therefore A. has a specific fund in the hands of B., or, in other words, B., as a depositary or otherwise, holds a specific sum of money which he is bound to pay to A., and if A. agrees with C. that the money shall be paid to C., or assigns it to C., or gives to C. an order upon B. for the money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee C., and it is not necessary that B. should consent or promise to hold it for or pay it to such assignee." Pomeroy Eq., section 1280, and cases cited. Undoubtedly, under these rules, a part of a general fund or debt may be assigned. As to whether or not a check works such assignment, is a question to be considered hereafter. What we now hold is, that the simple facts that the fund or debt is a general one, and that there is no promise or assent to the assignment by the debtor or holder of the fund, are not insuperable barriers to such an assignment.

6th and 7th. We do not think these reasons conclusive or well taken. The actions by the holder and drawer of the check, would not be for the same thing. If, by the check, the holder becomes the legal or equitable owner of the chose in action, or of the fund upon which it is drawn, his action would be either legal or equitable, in proper cases, for the

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amount of the check. The action by the drawer for the dishonor of his check is not for the amount of the check, but for injury to his credit by the dishonor. *Whitaker v. Bank of England*, 6 C. & P. 700; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Rolin v. Steward*, 14 C. B. 595; Morse on Banking, p. 519; Grant Banking, pp. 45, 69.

When a deposit is made in a bank, there is an implied promise on the part of the bank to the depositor, that it will pay such checks as he may draw, if, at the time of their presentment, it is indebted to him on account of deposits.

It is for a violation of this promise that the drawer has an action against the bank for damage to his credit. The implied promise on the part of the bank is not to pay all the depositor's checks, whether it is indebted to him or not at the time the checks may be presented for payment, nor to pay in the order drawn, if, at the time when drawn, it is indebted to him. If the check works but an equitable assignment of the chose in action, or funds drawn upon, of course the bank could not be affected in any way until after proper notice, as up to that time the equity would be a secret equity, as to the bank.

8th. That a promise upon a good consideration, made for the benefit of third parties, may be taken advantage of, and enforced in equity by such third parties, is well settled. And the fact that at the time the promise is made the third parties are not aware of it, and they, and the amount of their claims against the promisee, are unknown to the promisor, makes no difference, under the decisions of this and other courts. For want of privity of contract between the promisor and such third parties, such contracts could not be enforced under the common law. We cite some of the cases: *Bird v. Lanius*, 7 Ind. 615; *Hardy v. Blazer*, 29 Ind. 226, and cases there cited; *Devol v. McIntosh*, 23 Ind. 529; *Durham v. Bischof*, 47 Ind. 211; *Fisher v. Wilmoth*, 68 Ind. 449; *Miller v. Billingsly*, 41 Ind. 489. It should be noted that in these cases, except, perhaps, one in which work was done on the faith of the promise, the claims of the third parties were in existence

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when the promise was made. *Loeb v. Weis*, 64 Ind. 285; *Beers v. Robinson*, 9 Pa. St. 229. And so, promissory notes and bills of exchange, under some circumstances, and checks, where the holder is entitled to fill a blank with the name of the payee, are exceptions to the common law rule as to privity of contract. In such cases, of course, the payee is not known at the time the check is issued. 2 Whart. Con., section 795. These reasons, of themselves, therefore, as broadly stated, we think, are not conclusive in support of the doctrine of the cases of the first class. This brings us, naturally, to the main reason upon which the cases of the second class are grounded, viz., that the implied promise on the part of the depositary to pay the depositor's checks is a promise for the benefit of third parties, the check-holders, and may be enforced by them against the depositary. That there is an implied promise on the part of the depositary to the depositor to repay the amount deposited, upon the checks of the depositor, is the doctrine of all the cases and law-writers. This implied promise arises wholly from the custom of bankers in the transaction of business with depositors. *Morse Banking*, p. 35; *Downes v. Phoenix Bank*, 6 Hill, 297; *Margette v. Williams*, 1 Barn. & Ad. 415. Under this custom, the banker impliedly agrees to waive his right to insist upon repayment in one lump, and to pay in such sums as the depositor may order by his checks. This promise is made with the depositor, for his convenience, and we think can not be said to be made for the benefit of third parties, who may become the holders of the depositor's checks. And much less can it be said that the "promise is to the whole world." Neither can it be said, as we think, that under the custom of bankers, they receive the deposits with the understanding or thought that they assume any obligation or responsibility to the holders of the checks. It is clearly not the intention of bankers, when receiving deposits, that they may be sued by such individual check-holders upon a refusal to pay.

As said by this court in the case of *Nat'l Bank of Rockville*

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v. *Second Nat'l Bank of Lafayette, supra*, "There is no implied contract in favor of the payee, against the drawee, that he will either accept or pay the check." To hold otherwise would be to overthrow the 9th and 10th reasons upon which the first class of cases are grounded, which reasons are reasonable and supported by the great weight of authority. As there stated, the depository banks are not bound to settle conflicting claims of check-holders, nor could they transact their business if compelled to do so. It can hardly be supposed that the banks would establish a custom, to ripen into an implied contract, by which they would be thus subjected to annoyance, delay and uncertainty in the transaction of their business which must be done with the utmost dispatch. And then, too, if, with the deposit, there is an implied promise for the benefit of check-holders that may be enforced by them, it would result that after a check is presented, the holder is brought into privity with the bank, and the payment of the check can not be countermanded by the drawer. And so the courts have been compelled to hold, which have asserted the doctrine of the second class of cases. Such a holding, however, is opposed to the common understanding and to the general weight of authority. All of the cases of the first class, where the question is mentioned, assert the doctrine that at any time before payment, or before the bank has in some way committed itself to pay, the check may be countermanded by the drawer.

Mr. Morse, citing numerous cases in his support, says: "A check is simply a written order of a depositor to the bank to make a certain payment. It is executory, and as such, it is of course revocable at any time before the bank has paid, or committed itself to pay it. * * * * *

"The remark once fell from Judge STORY, in the oft cited 'Matter of Brown,' that the drawer of a check had no right to countermand payment at the bank. It was obvious from the context that the judge referred rather to moral right than to legal right. He meant simply that a debtor who had given to his creditor a check in payment of the debt had

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no right as towards that creditor, 'right' being considered as a matter of honesty, to order non-payment of the check. The language of the judge, taken in isolation from the circumstances of the case, and from the remainder of the opinion, seems to admit a different meaning, and is therefore capable of a misinterpretation and misuse, which have sometimes been feebly attempted. But if such a misunderstanding is possible, still the authorities to the contrary effect are numerous, and leave no shadow of doubt upon the point.

"The bank is the drawer's agent. Its primary duty is to hold or to pay his money as he directs. Primarily it owes no duty to the holder, except under and by virtue of directions from the drawer. Until, by reason of these directions, it has assumed voluntarily, or by action of law has involuntarily come under secondary and superseding obligations to the holder, the latest orders from the drawer govern its right to act on his behalf." Morse Banking, p. 302-3, and cases there cited. So, also, *Griffin v. Kemp*, *supra*; Story Prom. Notes, section 498, and cases cited.

This power on the part of the depositor to countermand the payment of checks is a part of the implied contract between him and the depositary when the deposit is made, as much as the implied agreement on the part of the depositary to pay his checks. We conclude, therefore, that the checkholder can not recover of the drawee on its implied promise to the depositor.

Another reason upon which some of the cases of the second class are founded is, that the check operates as an appropriation, *pro tanto*, of the fund in the hands of the drawee. This does not commend itself to our judgment. That the depositary is a bailee or trustee of any fund, is not supported by reason or authority. Strictly speaking, the depositary holds no fund to be appropriated. It owes a debt. The right of the depositor is a chose in action. This or a part of it may be assigned. When assigned, equity, for the purpose of making good the assignment, seizes upon the debt

and calls it a fund. An ordinary check, however, without words of transfer, and drawn upon no particular fund, does not effect such an assignment. In some of the cases it is said that by an acceptance of the check, an equitable assignment is effected; but this is not strictly correct, because, by accepting the check, the depositary assumes an independent and unconditional liability to the holder. *Morse Banking*, pp. 307, 313, and cases there cited.

The eleventh and last reason upon which the first class of cases is grounded, as given above, is, that in the absence of evidence, except what the check furnishes, it must be presumed that the payee takes the check upon the credit of the drawer. Many of the cases assert this, and it seems to us reasonable. It may be said that the payee relies upon the honesty of the drawer, in either an express or implied representation that the drawee is indebted to him. Doubtless, the payee of the check relies upon the financial ability of the drawer to make good his express or implied promise to refund to him the amount of the check, should payment be refused by the drawee. It could hardly be said that the payee of each check takes it with the idea of suing the drawee. Especially could this not be said where the drawer and payee are residents in one State, and the drawee in a distant State. That a part of a fund or chose in action may be assigned, we have already seen; and where there is an intention of the drawer and payee that a fund or chose in action, or a part of either, shall be assigned, the assignment may be effected by an order, bill or check. In such case the intention controls, and will be given effect by the courts. It is upon this principle that an order upon the whole of a special fund operates as an assignment. See *Pomeroy Eq.*, section 1280, *et seq.*, and cases there cited; *Bispham Prin. of Eq.*, pp. 219 and 220, and cases there cited.

Says Mr. Pomeroy: "What shall amount to the present appropriation which constitutes an equitable assignment, is a question of intention to be gathered from all the language

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construed in the light of the surrounding circumstances." Pomeroy Eq., section 1282. So, it is said by the same author, in the latter portion of section 1284 of the same work: "A check may undoubtedly operate in this manner as an equitable assignment when it is so drawn as to show an unmistakable intention of the drawer to transfer his exact deposit in the bank to the payee." See, also, *Kingman v. Perkins*, 105 Mass. 111. *Macomber v. Doane*, 2 Allen, 541. In the case of *Kahnweiler v. Anderson*, 78 N. C. 133, it was said that the intention to assign, founded upon a consideration, and expressed by a bill or draft, operates as an equitable assignment. In the case of *Bank of Commerce v. Bogy*, *supra*, it was said that the drawing of a bill of exchange does not, of itself, operate as an equitable assignment of the debt, but is evidence tending to show such an assignment; that anything that shows an intention on the one side to make an irrevocable transfer of the debt or fund, and from which an assent to receive it may be inferred, will operate in equity as an assignment. To the same point see *Kimball v. Donald*, *supra*; *First Nat'l Bank, etc., v. Dubuque R. W. Co.*, *supra*. This same doctrine is asserted in many of the cases above cited. In speaking of orders that will, or will not, of themselves operate as an assignment, Mr. Pomeroy gives a very safe criterion. He says: "The sure criterion is, whether the order or direction to the drawee, if assented to by him, would create an absolute personal indebtedness payable by him at all events, or whether it creates an obligation only to make payment out of a particular designated fund." Sec. 1280.

The acceptance of orders upon a particular designated fund, which are held as assignments, binds the acceptor only to the extent of the fund drawn upon. The acceptance of a check creates an independent, unconditional obligation on the part of the acceptor, whether he holds funds of, or is indebted to, the drawer or not.

Our conclusion is, that a check in the ordinary form upon the drawer's banker, without words of transfer, and drawn

upon no particular designated fund, does not of itself, operate as an appropriation or equitable assignment of a fund in the hands of the drawee, nor does it operate as an assignment of a part of the drawer's chose in action against the drawee.

Keeping in view our statutes, and the equitable rules already stated, we base this holding upon the considerations:

First. There is no implied contract on the part of the depositary of which the check-holder can take advantage as against the depositary.

Second. In the absence of evidence to the contrary, or a showing of an intention to assign a part of a fund in the hands of the drawee, or a part of the drawer's chose in action against the drawee, it should be presumed that the payee or holder of a check takes it upon the credit of the drawer, of whom he may collect, if payment be refused by the drawee.

Third. To hold the contrary, would be to disregard the implied and well understood right of the drawer to countermand the payment of checks.

Fourth. It would greatly embarrass banks in the transaction of their business to hold that they are liable to each check-holder, and hence must, at their peril, settle conflicting claims of check-holders.

In the case before us, the checks contain no terms of transfer; they are not drawn upon any particular designated fund, nor is there anything in them, or the circumstances connected with the giving of any of them, that indicates any intention on the part of the drawers or payees, that there should be an assignment of anything. We hold, therefore, that as between the payees or holders of the checks and the drawees, there was no appropriation or assignment of any fund, nor of any part of the drawer's chose in action against the drawees. It would seem to follow logically, that as there is no assignment as between the payee and drawee, there is none as between the drawer and payee. And so the cases of the first class hold.

This brings us to the third class of cases as we have grouped them, and to a consideration of the question as to whether

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or not, notwithstanding our conclusions thus far, the giving and receiving of the checks operated as an equitable assignment as between the payees and drawer, or, in other words, entitle the payees and holders to a preference over the depositors and other general creditors of the Indiana Banking Company.

THIRD CLASS OF CASES.

In an action to have a check paid in full from the estate of a bankrupt drawer, it was held, *In the Matter of Brown, in Bankruptcy*, 2 Story C. C. 502, that the holder was entitled to this, on the ground that a check is an instrument *sui generis*, and is to be construed exactly as the parties intend it; that the check, of itself, is an appropriation of the fund in the hands of the drawee, and that, consequently, the drawer has no right to withdraw the funds after giving the check.

The case of *First Nat'l Bank of Cincinnati v. Coates*, 3 McCrary, 9, grew out of the failure of the Mastin Bank, at Kansas City, as did the cases in 17 Blatchf., 79 Mo., and 91 N. Y., *supra*. The bank made an assignment to Coates, after having issued and delivered a "draft" upon its depositary in New York. Before the "draft" was presented for payment Coates withdrew the deposit from the New York bank. As between the assignee and payee, Mr. Justice MILLER held that the "draft" was in law and fact a check, and that while a deposit of money in a bank creates a debt on the part of the bank, it is a fund deposited to the credit of the depositor, and that the check operated as an appropriation or equitable assignment, *pro tanto*, of the fund to the holder, and that thus far the fund did not pass to the assignee. It seems to have been contended that there was no assignment by the check; that for want of privity, and because the check was for but a part of the fund drawn upon, and because the depositary could not be called upon to pay out the deposit except in a single payment, the payee of the check could not maintain an action against the drawee, and was, therefore, not entitled to a preference as against other creditors of the drawer. All this the

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Justice answered by saying that such is the rule at law, but not in equity. Upon substantially a similar state of facts, except that the check was for a collection made by the drawer, a like ruling was made in the case of *German Savings Institution v. Aday*, 1 McCrary, 501. Stress was laid upon the fact that the check was for a collection.

The facts in the case of *Gardner v. Nat'l City Bank*, 39 Ohio St. 600, were, that a party wishing money procured it by giving his check to a bank in Ohio upon a bank in Philadelphia for the full amount of his deposit in the latter bank. Before the check was presented, the Philadelphia bank remitted to the drawer by a certified check. He deposited this in another bank in Ohio as cash, and it was afterwards paid. After making subsequent deposits in this bank, and checking out various sums from time to time, the drawer made an assignment for the benefit of creditors. The assignee and all interested parties were brought before the court by an application on part of the payee of the check to have it paid in full. The court distinguished the case from one between the payee and drawee, or where the check is for less than the whole fund drawn upon, and held, that as between the drawer and payee, it was the manifest intention of the parties to transfer the absolute right to receive the amount from the drawee, and that the draft should operate as an equitable assignment of the funds in the hands of the drawee; that it did operate as such assignment, and that when the drawer received the amount from the drawee, it in equity belonged to the payee.

Mr. Daniel (2 Daniel Neg. Inst., sec. 1638), after arguing in favor of the doctrine of the cases of the second class above, states that there can be no doubt that, as between the drawer and payee, the check operates as an equitable assignment, and bases his statement upon the cases of the third class alone, and the cases of *Bell v. Alexander*, 21 Grat. 1, *Morrison v. Bailey*, 5 Ohio St. 13, *Robinson v. Hawksford*, 9 Q. B. 51, *Keene v. Beard*, 8 C. B. N. S. 373, and the case of *Bank of the*

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Republic v. Millard, supra. We are unable to understand in what way the case in Wallace, or the English cases, lend any aid to the position of the author. The cases cited from 5 Ohio St. and 21 Grat. did not involve the question necessarily, as they were actions upon the check by the holder against the drawer, the check not having been paid by the payee.

As will be observed, the case in 2 Story, *supra*, is based upon the broad statement that a check is an appropriation of so much of the fund in the hands of the drawee, so that the drawer can not withdraw it after giving the check. This case is in conflict with all the cases of the first class above, has been many times criticised and condemned, and we think properly so.

The case in 39 Ohio St. is based upon the theory, that from the fact that the check was for the whole of the drawer's deposit in the Philadelphia bank, and the other circumstances of the transaction, it plainly appeared, that as between the drawer and payee, the intention was to transfer the ownership of that deposit to the payee.

It is not improper to remark that the opinion in the case in 3 McCrary, *supra*, was delivered orally. If the sweeping statements there made as to the assignment by a check should be carried out to their full extent, they would result in a holding that in equity a check works such an assignment as between the payee and drawee also. Such a holding, as we have seen, would be in conflict with the great weight of authority. The same may be said of the case in 1 McCrary, *supra*.

Possibly, cases may arise where, as between the drawer and payee or holder of a check, a court of equity may interfere and protect the check-holder, not because the check of itself works an assignment of any fund or of any part of the drawer's chose in action against the drawee, but rather upon the equitable doctrine of money had and received.

By giving a check, the drawer impliedly says to the payee that he may collect so much from the drawee, if he will pay it. And while the depositary does not hold the money as the agent of the depositor, it may be said that as to when, to

whom, and in what amounts, the amount deposited shall be paid out, the depositary acts as the agent of the depositor, subject to his orders.

A check may be given, and before payment the money withdrawn from the depositary by the drawer under such circumstances that it would be inequitable and a fraud to allow the drawer to retain the amount received for the check and also the amount withdrawn from the depositary. For example, if A., having no property except a deposit, should receive B.'s money for a check upon the depositary, and, after giving the check, should withdraw the deposit; as an action upon the check would be fruitless, it might be that B. could, in equity, follow the money withdrawn by A. and recover it as for money had and received, if this would not interfere with the rights of other equally worthy creditors. This, however, is not the case before us.

One or two of the checks in the case before us were given for collections made by the banking company. It may be, that if the payees had declined to accept the checks, they might have insisted that the amounts thus collected were held in trust, and should, therefore, be paid in full. This they did not do, but accepted the checks and still retain them. We think that it should be held, as was held in one of the New York cases, that by accepting the checks instead of the cash, the payees gave credit to and relied upon the Indiana Banking Company, and thus placed themselves upon an equality with the other check-holders.

Some of the checks were purchased with cash by persons who were not depositors with the bank; others by depositors giving their checks. The court below held that the checks purchased with cash should, for that reason, be paid in full, and that the other checks should share *pro rata* with the other debts. We can see no substantial reason for such a preference. If the depositors had withdrawn the amount from the bank, and with this purchased the checks, it might well be said that they purchased them with cash. Whether the

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checks were paid for in cash or by the checks, the bank in each case received the amount of them.

The transaction between Murphy, Hibben & Co. and the Indiana Banking Company, in the delivery and acceptance of the checks, was attended with some circumstances peculiar to that transaction, but they are not such, we think, as to rebut the presumption that the checks were received upon the credit of the Banking Company, or to show that the parties intended that the checks should operate as an assignment of any fund or chose in action. And so with all of the checks, there is nothing to show that there was any intention by the parties that they should operate as an assignment of any fund or chose in action. There is nothing to overthrow the presumption that they were accepted upon the credit of the Indiana Banking Company.

The checks were dishonored. Because of that dishonor the holders have a right of action against the Indiana Banking Company. That right, like the right of action in favor of the depositors and other creditors, is a legal right. The affairs of the bank are in the hands of a receiver, but this does not change the nature of these rights. *Grammel v. Carmer, supra.*

There is nothing in the case to create a superior equity in favor of the check-holders as against the depositors and other creditors. No fraud is charged or shown whereby the payees were induced to part with their money for the checks. They were purchased in the usual course of business. The assets of the bank will not pay its debts in full. The depositors deposited their money, relying upon the credit of the bank, that the amounts would be repaid to them when called for. The payees purchased the checks, relying upon the credit of the bank, that the amounts paid for them would be refunded if, for any cause, the checks should not be paid by the drawees. It is a case where equality among the creditors is equity.

So far as it was adjudged below that the check-holders are not entitled to preference the judgment is affirmed; so far as

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it was adjudged that any check shall be preferred and paid in full as against the other creditors of the Indiana Banking Company the judgment is reversed, with instructions to the court below to proceed in accordance with this opinion. It is further ordered that the court below direct the receiver to pay the costs of this litigation thus far out of the fund in his hands.

NOTE.—ELLIOTT, J., did not participate in the decision of this cause.

Filed March 17, 1885.

No. 11,403.

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142	287

MATTINGLY v. THE CITY OF PLYMOUTH.

MUNICIPAL CORPORATION.—Establishing Street Grade.—Changing Grade.—Damages to Owners.—Under section 3073, R. S. 1881, the grade of a street, which can not be changed without the assessment and tender of damages occasioned thereby, is a grade established in pursuance of some ordinance or order of the common council involving some general plan of improvement or grading of a street, or specified portion thereof. And such grade, when established, must be approved and adopted, in some way, by the common council, and should be made a matter of record. The record of the survey establishing the grade should appear in the record which the civil engineer is required to keep; and the proceedings of the council should, in some way, either by ordinance or resolution, show that the survey establishing the grade was authorized or approved so as to make it authoritative. Until proceedings are had by the common council, directing that the grade of a certain street, or streets, or specific portions thereof shall be established, or that a grade already established is approved and adopted, in some authoritative way, by the common council, it can not be deemed that the "city authorities have once established" a grade of a street; and improvements are made by lot-owners subject to the right of the city to establish or change the grade without the assessment or payment of damages.

SAME.—Estoppel of Corporation as to Establishment of Grade.—The fact that an ordinance requires all sidewalks to be built in conformity with the grade of the corresponding street, and makes it the duty of the street commissioners to oversee the construction and maintenance of

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all sidewalks, and requires all persons, before laying a sidewalk, to apply to the city engineer for the proper grade, and to construct the proposed sidewalk in accordance with the grade as given by him, and the fact that one who does so apply makes such improvement according to the direction of the engineer, where the street has not been established by the steps above specified and required by section 3073, R. S. 1881, do not estop the city from establishing a different grade for the street without the assessment and tender of damages. Nor does the fact that the committee on streets, with the city engineer, directed the owner where to place the sidewalk, estop the city.

From the Marshall Circuit Court.

D. McDuffie, C. B. Tibbets and J. D. McLaren, for appellant.
A. C. Capron, for appellee.

MITCHELL, J.—The substance of the complaint is, that the plaintiff was the owner of certain premises in the city of Plymouth, abutting on Michigan street, on which was situate her dwelling and other improvements; that in the summer of 1881, desiring to make additional improvements upon her lots and the dwelling thereon situate, she applied to the city engineer to give her the proper grade in reference to which to raise her house, fill up her lots and by which to construct a sidewalk in front of and along her premises; that in pursuance of such request the city engineer gave her the grade of the street, and that she accordingly, at a large expense, filled up her lots, raised her house and constructed a sidewalk to conform to the grade so fixed and established by the city engineer; that after her improvements were completed and her sidewalk laid in conformity with the grade so given her, the city by its agents wrongfully tore up her sidewalk and lowered the same, and attempted to establish a different grade, without first assessing and tendering her the damages thereby occasioned, which she avers would be \$500. She asked and obtained a temporary restraining order, after which issues were made up on the complaint, and at the final hearing there was judgment for the city and against the plaintiff; and the record and assignment of errors

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here require us to consider the case upon the evidence, which is before us in a bill of exceptions.

The material facts as shown are, that Mrs. Mattingly, in the summer of 1881, owned the lots described in her complaint, and that they abutted on Michigan street; that at that time there was in force an ordinance of the city requiring all sidewalks to be built in conformity with the grade of the corresponding street, and making it the duty of the street commissioners to oversee the construction and maintenance of all sidewalks in the city, and to report to the common council all such as needed repairs. It also required that all persons before laying a sidewalk should apply to the city engineer for the proper grade, and that they should construct the proposed sidewalk in accordance with the grade as given them by him.

It appeared that Mrs. Mattingly applied to the city engineer who gave her the grade of Michigan street as requested, and it may be inferred that she made her improvements, so far as raising her house and filling up her lots, to correspond with the grade as fixed at that point by the city engineer. Later, the committee on streets and another city engineer agreed with the appellant, upon what is termed a "compromise grade," which was some inches lower than that established by the first engineer, and upon this grade it is claimed the sidewalk was built. As constructed, the sidewalk in front of the appellant's lots was from five to nine inches higher than those on either side, and the city council directed a re-survey to be made, which last survey fixed the grade for the sidewalk to correspond with the adjacent walks, and the city then notified the appellant to lower her walk accordingly. Compliance with this notice was refused, whereupon the city was proceeding to lower the walk when this suit was commenced.

It is now argued that the fixing of the grade for the sidewalk by the city engineer and the street committee was establishing the grade within the meaning of the proviso of

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section 3073, R. S. 1881, and that the grade so fixed could not lawfully be changed until the appellant's damages were assessed and tendered.

This section requires the civil engineer of an incorporated city to prepare plans and specifications, etc., for public improvements, and that he shall superintend the opening of streets and the preservation of the true lines thereof, etc.; that he shall make a record of all surveys, etc., and then provides, "That when the city authorities have once established the grade of any street or alley in the city, such grade shall not be changed until the damages occasioned by such change shall have been assessed and tendered to the parties injured or affected by such change, and such damages shall be collected by the city from the party or parties asking such change of grade in the manner provided for the collection of street improvements."

It is plainly inferable that the grade, the establishment of which is here referred to, and which can not be changed without the assessment and tender of the damages occasioned thereby, is a grade established in pursuance of some ordinance or order of the common council involving some general plan of improvement or grading of a street or specified portion thereof. And such grade, when established, must be approved and adopted in some way by the common council, and should be made a matter of record. The record of the survey establishing the grade should appear in the record which the civil engineer is required to keep, and the proceedings of the council should in some way, either by ordinance or resolution, show that the survey establishing the grade was authorized or approved, so as to make it authoritative.

Until proceedings are had by the common council directing that the grade of a certain street or streets, or specified portions thereof, shall be established, or that a grade already established is approved and adopted in some authoritative way by the common council, it can not be deemed that the "city

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authorities have once established " the grade of a street, and improvements are made by lot-owners subject to the right of the city to establish or change the grade without the assessment or payment of damages.

As the initial point in the appellant's case, it was necessary to show the existence of a duly established grade by the city authorities at the time the improvements were made; that the improvements were made with reference to a grade so established, and that the city was proceeding to change the grade so established, to the appellant's damage, without the assessment and tender of the damages so occasioned. This was neither averred in the complaint nor shown in the evidence, and so both are fatally defective.

In the case of *Nebraska City v. Lampkin*, 6 Neb. 27, it was held that in order to establish the existence of a grade for a street in a city, the records and files pertaining thereto should be produced, and that unless these are shown to have been lost or destroyed, no other proof is admissible.

The ordinance of the city of Plymouth, requiring persons to construct sidewalks in conformity to the existing grade of the streets, and also requiring the city engineer, on application, to fix for such persons the grade on which their sidewalk should be laid, was a proper regulation to secure uniformity and safety in the sidewalks; but it can not be said that because this was required, and sidewalks were built and improvements made with reference to grades so fixed, the city was thereafter estopped from establishing a different grade for the street without the assessment and tender of damages; nor does the fact that the committee on streets, with the city engineer, directed the appellant where to place her sidewalk, estop the city.

The judgment is affirmed, with costs.

Filed March 10, 1885.

The Terre Haute and Logansport R. R. Co. v. Crawford *et al.*

No. 11,019.

THE TERRE HAUTE AND LOGANSFORT RAILROAD COMPANY *v.* CRAWFORD ET AL.

RAILROADS.—Right of Way.—Award of Appraisers.—Exceptions.—Issue.—Evidence.—Damages.—Where a railroad company appropriates land for its right of way, and the appraisers appointed to appraise the damages of the owner of the land, by reason of such appropriation, file their award of such damages, and the owner appeals from such award and excepts thereto upon the ground, among others, that the damages awarded were inadequate and unjust, for the reason that when the road was built, as proposed, upon the line appropriated, it would be necessary for the owner to fill his land, from two to five feet, the entire length of the line appropriated, at large cost to him, and where, upon the trial of the issue thus tendered, evidence is admitted tending to prove the cost of making such fill, as an element of the owner's damages, the railroad company can not successfully complain of the admission of such evidence as error for the first time in the Supreme Court.

SAME.—Cost of Fill.—Evidence.—Instruction.—Error.—Where, upon the trial of the issue so tendered, evidence is offered and admitted, without objection or exception, tending to prove the cost to the owner of making such fill, an instruction, to the effect that in determining the amount of the owner's damages arising from the appropriation of his land for such right of way, it is proper for the jury to consider, among other things, the cost to him of making such necessary fill, is within the issues and applicable to the evidence in the cause, and, therefore, is not an available error.

SAME.—Evidence.—Opinion of Non-Expert.—The opinion of a non-expert witness, as to the cost or value of the work in making such fill, is competent evidence.

SAME.—Appropriation for Right of Way.—Appeal from Appraisers' Award.—Payment of Final Damages.—Vesting of Title.—Where a railroad company appropriates land for its right of way, and the appraisers award damages to the owner of the land, from which award an appeal is taken to the proper court, the payment to the clerk of the damages awarded by the appraisers will operate only as a license to the railroad company to take possession of the land so appropriated; and the title to such land will not vest in such railroad company until it has fully paid the damages finally assessed and adjudged in favor of such owner upon the final determination of such appeal by the proper court.

From the Cass Circuit Court.

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125 330
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The Terre Haute and Logansport R. R. Co. v. Crawford *et al.*

D. B. McConnell, R. Magee, S. T. McConnell, D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellant.

J. C. Nelson and Q. A. Myers, for appellees.

Howk, J.—On the 23d day of October, 1882, the appellees were the owners of a certain tract or lot of land, containing nearly eight acres, lying within the corporate limits of the city of Logansport, in Cass county. About the same date, the appellant deposited in the clerk's office of the court below a written instrument of appropriation, wherein it proposed to appropriate all the right, title and interest of the appellees in and to a strip of such land, fifty feet in width and extending through the land on a slight curve, the same width, four hundred and seventy-six and one-half feet in length, for the purpose of constructing, maintaining and operating thereon the main track of an extension of appellant's railroad, etc. Appraisers were duly appointed to appraise the damages which the appellees would sustain by reason of such appropriation of their land, and such appraisers made due return to the clerk of the court below of their appraisal of appellees' damages, setting forth therein that the value of the land taken by the appellant was \$200, and that the residue of the land would be damaged in the further sum of \$200. Written exceptions to the appraisers' award of damages were filed both by the appellees and the appellant, and the issues of fact arising thereon were submitted to a jury for trial. A general verdict was returned for the appellees, assessing their damages, by reason of appellant's appropriation of their land, at the sum of \$1,250; and with such verdict the jury also returned into court their special findings on particular questions of fact, submitted to them by the parties under the direction of the court. Over the appellant's motion for a new trial, the court rendered judgment against it, in appellees' favor, for the damages assessed and costs.

In this court, error is assigned by the appellant, which calls in question the decision of the trial court in overruling

The Terre Haute and Logansport R. R. Co. v. Crawford *et al.*'

its motion for a new trial. In this motion, a large number of causes were assigned for such new trial, but of these we will consider such only as the appellant's counsel have discussed in their elaborate briefs of this case. In their statements of this cause, as preliminary to the first matter of which they complain, the appellant's counsel say: "It will be seen from an examination of the record, that the land in controversy lies in the northeastern portion of the city of Logansport, in a body of about eight acres; that appellant's right of way runs in an eastern direction, in a very slight curve, across the south side of the tract, cutting off and separating from the main tract about one-half of an acre; that when appellant's track is completed to grade, there will be an embankment from west to east, between appellees' land and the main portion of the city of Logansport, about three feet high at the west line of appellees' land, and rising by an ascending grade until it is nearly five feet high at the east line of their land, on the west line of Michigan avenue, thus leaving on the north side of the appellant's track about two acres, possibly three acres, of appellees' land that will be from three to five feet lower than the surface of appellant's track." Of the foregoing statement, the appellees' counsel say: "We believe that the appellant has, in its brief, stated correctly the character of the construction of the road through appellees' land; that the line of the road is on a curve, with a gradually ascending grade from west to east, making a fill the entire distance of four hundred seventy-six and one-half feet, averaging from three to six feet in height. None of the land was low, flat, swampy or wet, before the location and construction of the road. That part, about which the witnesses testify it will be necessary to fill, was high and dry with a gradual ascent to the north, only suitable and valuable for residence purposes. * * * The jury further find, as a fact, that after the location of the road, before these lands could be used for building purposes, it would be necessary to fill them up."

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With these statements of the respective counsel before us, we come now to the consideration of the first alleged error of law occurring at the trial, of which complaint is made in argument by appellant's counsel, namely, that, "as a measure of the appellees' damages resulting to them by reason of the appellant's appropriation of their land, the court allowed appellees to offer and give testimony tending to prove the cost of filling up of those low lands, over the appellant's objections." The point is made by appellees' counsel, and it seems to us to be sustained by the record, that the appellant saved no exceptions to the rulings of the court in the admission of this evidence; that the court was not requested by the appellant to instruct the jury to disregard such evidence, and that particular questions of fact, depending for their answer upon this evidence, without any objection thereto by the appellant, were submitted by the court to and answered by the jury. In this state of the record, the appellees' counsel earnestly insist that the appellant's objections to the admission of evidence tending to prove the cost of filling up the appellees' land, which was lower than the embankment of the railroad, as a measure or, rather, as an element of the appellees' damages resulting to them by reason of the appellant's appropriation of their land, come too late when made in this court for the first time, and can not be considered as affording any sufficient ground for the reversal of the judgment.

In their first brief of this cause, the appellant's counsel next complain in argument of the following instruction to the jury, given at appellees' request: "The question submitted to you is one of damages, arising from the appropriation of the lands of certain persons named in the article of appropriation. In determining this question, it is proper for you to consider the value of the land actually taken, at the date of the appropriation, the effect upon and injury, if any, caused to the remainder of the land by the appropriation, the cost, if any, the construction will occasion to the owners in rendering it necessary for them to fill up lots or remaining

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portions of the land," etc. This is only a brief extract from a very long instruction, but it is all of it of which complaint is made here by the appellant's counsel. Did the court err in instructing the jury that it was proper for them to consider, in determining the amount of appellees' damages by reason of the appellant's appropriation, the cost, if any, the construction of the railroad would occasion to the appellees in rendering it necessary for them to fill up their lots or the remaining portions of their land?

In one of their exceptions to the award of damages by the appraisers, the appellees said that such award was inadequate and unjust, and not commensurate with the damages they would sustain on account of appellant's appropriation, for the reason that when the road was constructed on the line appropriated to the established grade, there would be a fill across their lots and land the entire length of the land appropriated, of from two to five feet, which fill would render the adjoining land and lots of much less value, because it would be necessary to fill them two to five feet before they could be used for any purpose, or be marketable at any price; that to make such fill would put the appellees to an additional cost of \$1,500, and in that amount would damage their property, etc.

This exception tendered one of the issues which were tried by the jury, and evidence was offered and admitted, without objection by the appellant so far as the record shows, tending to sustain the exception. Indeed, it seems to us from the record, that the cause was tried below upon the theory that the cost of filling appellees' land and lots, rendered necessary by the construction of appellant's railroad, was a proper matter to be considered by the jury in estimating the amount of appellees' damages, caused by the appropriation. Without deciding whether or not this theory was correct, we are of opinion that the instruction complained of was within the issues and applicable to the evidence, in this cause, and that it affords no sufficient ground, therefore, for reversing the judgment below.

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One Frederick Behrens, a witness for appellees, testified that he lived in Logansport and was sexton of the cemetery; that he had some experience in hauling dirt and filling up lots in the city of Logansport, and had done "lots" of that kind of work and knew what it was worth; that he knew where the appellees' land lay, had worked there and had seen it before, for some years; that he knew where appellant's railroad ran through such land, had hauled gravel up there; and that he had examined the lay of appellees' lots north of the railroad. He was then asked by the appellees' counsel: What was it worth to fill up these lots? Appellant objected to the question, "for the reason that it is not a matter that an expert can be called upon to testify in relation to, and because it must be arrived at by giving the number of yards of dirt necessary," etc. The court overruled the objection, the appellant excepted, and the witness answered: "It is worth from \$800 to \$1,000.

This ruling of the court was assigned as cause for a new trial by appellant, and is complained of here as erroneous. Counsel say: "Appellant submits that it was not competent for the witness to state what it would cost to fill the three acres. That was one of the questions, if allowable in the case at all, which the jury were to decide. Had the witness stated facts upon which his conclusion rested, it would have been the exclusive province of the jury to determine the cost of the fill." In support of their argument, appellant's counsel cite the cases of *City of Logansport v. McMillen*, 49 Ind. 493, and *Ohio, etc., R. W. Co. v. Nickless*, 71 Ind. 271, and they add: "Without further discussion of this question, appellant cites the recent case of *Yost v. Conroy*, 92 Ind. 464 (47 Am. R. 156), in which case the precise question is presented and decided." We are of opinion, however, that the question propounded and the answer of the witness thereto, in the case in hand, are not in conflict with the rules of evidence declared in either of the cases cited and relied upon by appellant's counsel. On the contrary, we think that the evidence complained

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of here was clearly competent, under the rule of evidence recognized and acted upon by this court, in *Johnson v. Thompson*, 72 Ind. 167 (37 Am. R. 152). This rule is thus stated in Greenleaf on Evidence, vol. 1 (13th ed.), section 440, note: "Non-experts may give their opinions on questions of identity, resemblance, apparent condition of body or mind, intoxication, insanity, sickness, health, value, conduct, and bearing, whether friendly, or hostile, and the like." The rule has been repeatedly recognized and followed in the more recent decisions of this court. *Bowen v. Bowen*, 74 Ind. 470; *Smith v. Indianapolis, etc., R. R. Co.*, 80 Ind. 233; *Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347 (43 Am. R. 91); *Yost v. Conroy*, *supra*. In the case last cited, which is one of the cases cited by appellant, the doctrine is said to be elementary, that witnesses acquainted with values may express their opinions in relation to values. Under this rule, it was clearly competent for the witness, Behrens, to express his opinion as to what it would be worth to fill up appellees' lots. Of course, the appellant had the right, by cross-examination, to draw out the basis of the witness' opinion, and to show thereby, if he could, that such opinion was of little or no value; but the opinion was none the less competent and admissible in evidence, for whatever it might be worth.

We can not disturb the general verdict of the jury upon the ground of excessive damages. In answer to a particular question of fact, propounded by appellant and submitted by the court, the jury found upon evidence tending to sustain such finding, that the value of the entire tract of land owned by appellees, at the time of and immediately before appellant's appropriation, was \$6,500, and that the value of the balance of the land, after the appropriation was made, was \$5,250. The difference between these two sums is \$1,250, which, as we have seen, is the amount of the general verdict.

The last error of which complaint is made here by appellant's counsel, is the overruling of the motion to modify and correct the judgment below, and to strike therefrom the fol-

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lowing words: "And that the title to such right of way shall vest in said railway company, when this judgment, interest and costs are paid and satisfied." There is no error, we think, in this decision of the court. The precise question arising on appellant's motion was presented to and decided by this court, adversely to the position and argument of appellant's counsel, in *Lake Erie, etc., R. W. Co. v. Kinsey*, 87 Ind. 514. In that case, as in the case at bar, the railroad company proceeded to condemn and appropriate a right of way for its road, under the provisions of section 3907, R. S. 1881, in force since May 6th, 1853, and, having paid to the clerk the damages awarded by the appraisers, took possession of such right of way. There as here, also, the owner of the land filed exceptions to the award of damages and appealed to the circuit court, where, on trial had, the damages were largely increased, and judgment was rendered accordingly. Such judgment was not paid, and the owner brought an action against the railroad company to recover possession of the land appropriated for its right of way. Upon the foregoing facts, it was held by this court in the case last cited, that the owner was entitled to recover, and, further, that the payment to the clerk of the damages, awarded by the appraisers, did not vest the title to the land appropriated in the railroad company, but operated only to give it a license to take possession, subject to the result of future litigation, and determinable upon its failure to pay the compensation found just on final trial.

We have now considered and passed upon all the questions discussed by appellant's counsel, in their briefs of this cause, and our conclusion is that no error is saved in or shown by the record, which authorizes or requires the reversal of the judgment.

The judgment is affirmed with costs.

Filed Feb. 20, 1885.

No. 11,651.

LEVERING ET AL. v. SHOCKEY ET AL.

MARRIED WOMAN.—Mortgage of Land Acquired by Gift.—Estoppel.—Deed.—While the act of 1879 (Acts 1879, Spec. Sess., p. 160) was in force, a mortgage by a married woman, to secure her husband's debt, of lands acquired by gift, was invalid, and a recital in the deed to her, showing a cash consideration, did not estop her from showing by parol evidence that the conveyance was in fact a gift, and not for a valuable consideration.

SAME.—Statute Construed.—The present statute, R. S. 1881, section 5117, which subjects a married woman to *estoppel in pais*, is not retroactive.

From the Tippecanoe Superior Court.

F. H. Levering and J. A. Stein, for appellants.

W. D. Wallace, for appellees.

COLERICK, C.—This case is concisely and correctly stated by the appellees in their brief, as follows:

“This was an action commenced by the appellee Sophia E. Shockey, a married woman, to cancel a mortgage executed by her on her separate property to the appellant William H. Levering, trustee, to secure a debt of her husband, Robert C. Shockey.

"The appellant Eliza J. Heath, being the beneficiary for whom Levering acted as trustee, was made a party defendant.

“The mortgage was executed on the 15th day of March, 1880, and the complaint is based on the 10th section of the act concerning married women, approved March 25th, 1879, which forbids a married woman to mortgage her separate property, ‘acquired by descent, devise or gift, as a security for the debt’ of her husband.

“The complaint shows that the appellee was the wife of Robert C. Shockey at the time of the execution of the mortgage; that the appellant Levering loaned eight hundred dollars in money to her said husband, and took his individual note and certain interest notes for the same; that she executed the mortgage on her separate real estate, which she had long since acquired, and then held, by gift from her said hus-

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band, who had conveyed the same to her through the intervention of a trustee on the 14th day of June, 1873, and that said mortgage was executed at the solicitation of her said husband, and to secure his said loan from Levering, and for no other purpose and upon no other consideration.

"The appellants answered in three paragraphs.

"The first was a general denial.

"The second paragraph, while not denying that the appellee had acquired title to the mortgaged property by gift, averred that the deed through which she obtained title, executed by John Dickson, the person to whom her husband had conveyed, imported on its face a valuable consideration, as did prior deeds in the chain of title, and that these deeds were of record at the time of the execution of the mortgage, and that appellants relied upon these records for knowledge of the nature of the appellee's title; wherefore they claimed that she was estopped from asserting that she had acquired the title by gift.

"The court sustained a demurrer for want of facts to this plea, and appellants excepted.

"The third paragraph filed by appellants was a cross complaint, in which they declared on the notes and mortgage, in the usual way, and asked for judgment and a decree of foreclosure.

"The appellee answered the cross complaint in two paragraphs.

"In the first she set up the matters averred in her complaint, viz., her coverture, separate property in herself acquired by gift, and that the mortgage was given as a security for her husband's debt, etc., etc. This answer to the cross complaint the court held good on demurrer, and the appellants replied to the same by general denial.

"Appellee's second paragraph of answer to cross complaint was a general denial.

"The issues thus formed were tried by a jury, who found for the appellee, and that the mortgage was invalid and should be cancelled.

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"The evidence, which is all in the record, shows that Robert C. Shockey, who was the owner of the mortgaged premises, on the 14th day of June, 1873 (his wife joining therein), conveyed the land by warranty deed to one John Dickson, who, on the same day and at the same time, conveyed the land by like warranty deed to the appellee. Both of these deeds, which were duly recorded, import on their face a consideration of three thousand dollars. The clear, unequivocal and uncontradicted proof, however, was, that there was no consideration whatever for the deeds, but that Dickson was a mere trustee to effect the transfer, and that the transaction was a pure gift from the husband to the wife, and that, too, at a time when he was not in debt."

The only question presented by the appellants for our consideration is, Was Mrs. Shockey estopped, by the recitals expressed in the deeds, as to the consideration upon which they purported to be founded, from assailing the validity of the mortgage, by averring and proving that the deeds were, in fact, executed without consideration, and conveyed to her merely by way of gift the property therein described?

At the time of the execution of the mortgage a statute existed in this State which provided that "A married woman shall not mortgage or in any manner encumber her separate property acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person." Acts 1879, Spec. Sess., p. 160, section 10. By the explicit language of this statute, Mrs. Shockey was absolutely prohibited from executing the mortgage in question, and as it was executed by her in contravention of the inhibition so imposed, it was and is void. See *McCarty v. Tarr*, 83 Ind. 444; *Gregory v. Van Voorst*, 85 Ind. 108; *Frazer v. Clifford*, 94 Ind. 482.

The actual consideration of a deed may be shown by parol evidence. *Headrick v. Wisheart*, 57 Ind. 129; *McDill v. Gunn*, 43 Ind. 315; *Stearns v. Dubois*, 55 Ind. 257; *Welz v. Rhodius*, 87 Ind. 1 (44 Am. R. 747), and cases cited. Either party may show for any purpose, except to defeat its operation

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as a valid and effective grant, the true consideration of a deed, although it be entirely different from that expressed in the deed. *Mather v. Scoles*, 35 Ind. 1. The consideration expressed is the least important part of the instrument, and may be varied to almost any extent by parol evidence, as the estate created does not depend upon it, but upon the conditions and limitations contained in the instrument, descriptive of its quantity and duration. *Thompson v. Thompson*, 9 Ind. 323. When one consideration and no other is expressed in a deed, parol evidence is admissible to prove a different consideration, though the legal effect of the deed may be thereby changed. *Rockhill v. Spraggs*, 9 Ind. 30; *Andrews v. Andrews*, 12 Ind. 348.

It is unnecessary to decide in this case whether such evidence is competent where the interests or rights of subsequent purchasers or creditors, without notice, would be prejudicially affected thereby. Probably in such a case, as a general rule, the recital in the deed as to the consideration would operate as an estoppel in favor of such persons, and preclude, as against them, proof as to the true and actual consideration, if it differed from that expressed in the deed; but such an estoppel could not, under the law of this State, as it existed prior to September 19th, 1881, be created against a married woman. See *Wilhite v. Hamrick*, 92 Ind. 594; *Parks v. Barrowman*, 83 Ind. 561; *Brandenburg v. Seigfried*, 75 Ind. 568; *Suman v. Springate*, 67 Ind. 115; *Miles v. Lingerman*, 24 Ind. 385; *Behler v. Weyburn*, 59 Ind. 143; *Sims v. Bardoner*, 86 Ind. 87 (44 Am. R. 263); *Buchanan v. Hubbard*, 96 Ind. 1.

It is now provided by statute that a married woman "shall be bound by an estoppel *in pais*, like any other person." R. S. 1881, section 5117. This provision of the statute took effect September 19th, 1881, and is prospective, and not retroactive in its effect and operation (*Wilhite v. Hamrick*, *supra*), and, therefore, is inapplicable to this case, as the facts upon which the appellants relied as creating and constituting an estoppel against Mrs. Shockey transpired before its enactment.

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A married woman can not, by her own act, enlarge her legal capacity to convey or bind her separate estate. *Bank of America v. Banks*, 101 U. S. 240. To hold that Mrs. Shockey was estopped from asserting the invalidity of the mortgage would be equivalent to holding that she had power to execute it, and thus overthrow the statute which prohibited its execution. *Behler v. Weyburn*, *supra*; *Lowell v. Daniels*, 2 Gray, 161; *Herman Estop.*, section 215. A court of equity has no more power than a court of law to recognize or give effect to instruments which by statute are inoperative. *Townsley v. Chapin*, 12 Allen, 476; *Merriam v. Boston, etc., R. R. Co.*, 117 Mass. 241; *Bemis v. Call*, 10 Allen, 512. She was not estopped from assailing the validity of the mortgage although it was received by the appellants without notice of her legal incapacity to execute it. See *Buchanan v. Hubbard*, *supra*; *Sims v. Smith*, 86 Ind. 577; *Miles v. Lingerman*, *supra*; *Merriam v. Boston, etc., R. R. Co.*, *supra*.

It follows, we think, from the views above expressed and the authorities cited, that the mortgage in question was void, and that Mrs. Shockey was not estopped from assailing its invalidity.

As there is no error in the record the judgment should be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellants.

Filed March 12, 1885.

No. 11,694.

TEST ET AL. v. LARSH ET AL.

NEW TRIAL.—*Newly Discovered Evidence.*—*Diligence.*—Where, upon a trial, the controversy turns upon the proof of payment, and the plaintiff, who has the burden and knows the defendant will probably dispute payment, calls but a single witness to prove it, without making any effort to obtain corroborating testimony, though one of his witnesses could have then testified to the newly discovered evidence, the plaintiff fails to show requisite diligence, and is not entitled to a new trial.

From the Wayne Circuit Court.

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W. D. Foulke, J. L. Rupe and C. H. Burchenal, for appellants.

W. A. Bickle and T. J. Study, for appellees.

BEST, C.—This cause is here for the fourth time. On the 28th day of October, 1868, the appellants instituted this proceeding for the assessment of such damages as the appellees might sustain by the erection of a woollen-mill upon White Water river in Wayne county, in this State, and by the diversion of sufficient water from said river to operate said mill. A writ was issued, the application sustained, and the appellees' damages assessed at \$30. Upon the return of the writ issues were formed, a trial had, the application again sustained, the same damages assessed, and judgment rendered accordingly. This judgment was reversed by this court. *Larsh v. Test*, 48 Ind. 130. After the cause was remanded the appellees filed an amended answer, to which the appellants filed a reply of two paragraphs. In both paragraphs they recited at length the proceedings which resulted in the assessment of the appellees' damages at \$30, and averred that within one year thereafter, and before the appeal was taken to this court, the appellants paid the appellees the damages so assessed. A demurrer was sustained to each paragraph of this reply, the cause tried and judgment rendered for the appellees. This judgment was reversed by this court for the error in sustaining the demurrer to the reply. *Test v. Larsh*, 76 Ind. 452. After the cause was remanded, issue was taken upon the reply, the cause tried, and judgment again rendered for the appellees. This judgment, upon appeal, was affirmed by this court. *Test v. Larsh*, 98 Ind. 301. After the adjournment of the court at which this cause was last tried, the appellants filed a complaint for a new trial, on the ground of newly discovered evidence. This application was tried, a new trial denied, and from such ruling this appeal has been taken.

The appellants, upon the trial, did not attempt to support the reply by proof that the damages assessed had been paid

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by them to the appellees, or either of them, personally, but by proof that they had paid them to the appellees' attorney, and that he had paid them to Leroy M. Larsh. The last proposition the appellees disputed, and this was the disputed question of fact.

In support of such payment the appellants called the appellees' former attorney, who testified that the appellants paid him the \$30 on the 20th day of April, 1870; that on the same day, or within a day or two thereafter, Leroy M. Larsh called at his office, and that he informed him that the appellants had paid him the \$30; that Larsh expressed surprise that he should have taken the money, and declared that he would not accept it if its acceptance would in any way affect the appellees' right to appeal; that he answered Larsh that its acceptance would not affect their rights, and then Larsh took \$2 of the money, directed the witness to apply \$8 upon a note, and the residue upon his fees, all of which was done.

In opposition to such payment the appellees called Leroy M. Larsh, who testified that he went to the office of their attorney about the time named, and was then informed by him that the appellants had paid him the \$30; that he then informed such attorney that he had no authority to accept such money, and declared that he would not accept it; that he at once left the office without accepting said money, or any portion of it; that he never received \$2 of such money, nor directed such attorney to apply any portion of it upon a note or upon his fees, nor receive it, or any portion of it, in any manner whatever.

This was all the testimony upon this disputed question of fact.

This cause was tried during the latter part of May, 1882, and on the 24th day of August thereafter the appellants filed their complaint for a new trial, alleging therein that they can prove by Luther M. Mering that Leroy M. Larsh admitted to him previous to the trial that he had received from their attorney the \$30 damages, substantially as stated by him, and

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that they had employed the requisite diligence to discover such testimony upon the trial, but did not learn of the same until the 26th day of June, 1882.

On the hearing of this motion Luther M. Mering was called, and testified that he had a conversation with Leroy M. Larsh in March, 1882, and that Larsh then stated to him that he had received from said attorney the \$30 damages, substantially as stated by him. This is the newly discovered testimony.

Assuming that this testimony would probably change the result upon another trial, it was also necessary for the appellants to show that they employed reasonable diligence to discover it before the trial. This the appellees insist was not done. The reversal of the judgment for the error in sustaining the demurrer to the reply occurred several months before the trial. After this, and before the trial, the appellants called upon said attorney and inquired of him about the payment of the money, and was informed by him that he had paid the money to Leroy M. Larsh, as stated by him, and that he would so testify. This was all that was done. No effort was made to obtain any other evidence of such payment. No inquiry was made of any one as to any admissions of such payment by any of the appellees. Nothing was done. The excuse is that appellants did not suppose that Leroy M. Larsh would dispute such payment. Nothing appears to justify such supposition. The attitude of the parties and the pending issue would seem to indicate the contrary. Such excuse, therefore, can not relieve a party from the duty of exercising ordinary diligence. They also say that they had no reason to suspect that such admission had been made, and, therefore, had no reason to make any inquiry. In connection with this position it is proper to say that Luther M. Mering owned a mill near these parties; that he knew them well, saw the appellants frequently, talked with them about their suit occasionally, and was called and testified as a witness for them on the trial. In view of the fact that the burthen of the issue

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was upon the appellants, and that they had no evidence that Leroy M. Larsh would not deny such payment, we think ordinary diligence required them to seek some evidence with which to corroborate the statements of their witness—at least to ascertain from their own witness all he knew in relation to the matters in dispute. Had any such inquiry been made, this testimony would have been discovered, and we think the circumstances of this case imposed the duty upon appellants to institute such inquiry, at least among their own witnesses, as this was probably the only method of obtaining any corroborating testimony. The omission to do so constitutes such want of diligence as precludes them from obtaining a new trial on the ground of newly discovered evidence. This conclusion is in harmony with several of our own cases. *Bowman v. Clemmer*, 50 Ind. 10; *Ft. Wayne, etc., R. R. Co. v. Fhalor*, 51 Ind. 485; *Toney v. Toney*, 73 Ind. 34; *Arms v. Beitman*, 73 Ind. 85; *Hines v. Driver*, ante, p. 315.

We are, therefore, of opinion that the finding of the court was right, and that the order in overruling the motion for a new trial should be affirmed.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment of the court be affirmed, at the appellants' costs.

Filed March 12, 1885.

No. 10,974.

INDIANA INSURANCE COMPANY v. HARTWELL.

INSURANCE.—*Pleading.*—*Complaint.*—*Exhibits.*—A complaint upon a policy of insurance to recover for a loss by fire, which does not exhibit the policy, or a copy of it, is bad on demurrer.

SAME.—*Agency.*—*Cancellation of Policy.*—*Notice.*—An agent, with authority to obtain insurance, is not necessarily an agent of the insured, to whom notice of cancellation of the policy may be given, or payment of the unearned premium made, so as to bind the insured; nor is a recital in the policy, that the broker obtaining the insurance was agent of the insured, conclusive upon that subject.

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SAME.—Refunding Unearned Premium.—In such case a direction to the agent to charge the unearned premium to the insurance company, he being personally indebted to the latter in a larger sum, is not a compliance with a stipulation in the policy that it may be cancelled by refunding the unearned premium.

From the Marion Superior Court.

V. Carter, for appellant.

C. F. Rooker and *A. W. Hatch*, for appellee.

MITCHELL, J.—The case made in the record before us is based upon a complaint filed in the Marion Superior Court to recover a loss occurring under a policy of fire insurance issued by the appellant upon the property of the appellee.

The first error insisted on is, that the court erred in overruling a demurrer to the complaint, and the objection pointed out is that neither the original nor a copy of the policy of insurance is filed with or made a part of the complaint. The failure to file either the original or a copy of the policy of insurance, constituting as it does the foundation of the action, is conceded to be error.

Affidavits from counsel on both sides are here, from which we are convinced that at the time the demurrer was considered by the learned court below, it was ruled upon as if the policy had been made a part of it. Whatever arrangement may have existed between counsel at the time, inasmuch as they are not in accord about it now, we can only consider the record as we find it. That the final determination of the case may be facilitated, we will examine such other questions in the record as may arise on a second trial.

The second paragraph of answer, to which the court sustained a demurrer, set up, in substance, that the policy of insurance was effected through the agency of Mickel & Gardner, insurance brokers in the city of Chicago. It is averred that these brokers were the agents of the insured for the purpose of procuring a line of insurance on the factory of the insured, which was situate in Chicago; that they made the application and received the policy, and that the insurance company had

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no communication with the insured whatever; that there was contained in the policy a stipulation to the effect that only such persons as should hold the commission of the company should be deemed its agents, in any transaction relating to insurance, renewals and the payment of premiums, etc.; any other persons were to be deemed the agents of the assured. The policy also contained a stipulation by which the company reserved the option of terminating the policy at any time, on giving notice to that effect and refunding a ratable proportion of the premium paid.

It was averred that at a date prior to the loss, the appellant exercised its option to cancel the policy, and gave written notice to Mickel & Gardner to that effect, and directed them to charge against it the amount of the unearned premium, they being at the time its debtor in a much larger sum.

The agency, which it is claimed existed on behalf of the insured, by Mickel & Gardner, is predicated upon the stipulation in the policy above referred to, and upon the fact that they were employed to procure a line of insurance for him. It is contended that the notice to them of the cancellation, and the direction to them to charge the insurance company with the unearned premium, was a compliance with the stipulation in that regard, and effected a cancellation of the policy.

The case of *Grace v. American Central Ins. Co.*, 16 Blatchf. 433, is relied on, and it fully sustains the first branch of the proposition stated. This case, however, was decided at the circuit, and upon appeal to the Supreme Court it was reversed, and the law ruled explicitly the other way. *Grace v. American Central Ins. Co.*, 109 U. S. 278. In that case, as in this, the subject of agency was sought to be controlled by a stipulation in the policy, coupled with the fact that an insurance broker placed or procured the policy for the insured. Speaking of the relation which the broker sustained to the insured, HARLAN, J., said: "When the contract was consummated by the delivery of the policy he ceased to be the agent of the insured, if his employment was solely to procure the insurance."

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The averments in the answer we are considering show nothing more than that the brokers were employed or solicited to procure a line of insurance for the appellee. Whether or not in doing that they were the agents of the insured or the insurer, must depend upon the actual relations which existed between the parties at the time, and not solely upon the stipulation in the policy. At all events, at the time the notice of cancellation was given, some five months after the policy was issued, no agency existed upon the facts stated in the answer authorizing the broker to accept a notice of cancellation.

Aside from the foregoing considerations, the answer falls far short of showing a compliance with the condition upon which a cancellation might be claimed. Notice to the insured and a refunding of the unearned premium were the prerequisites to a cancellation. That the insurance brokers, whether the agents of one party or the other, were directed to charge the insurer with the amount, was no compliance, no matter how much they were in its debt.

Other questions relating to the admissibility of certain evidence, as applicable to the issues as made, are discussed, but as necessarily the pleadings must be reformed before another trial is had, these questions may not arise again, and we forbear examining them.

It may be well to add that the question as to whether Mickel & Gardner were or were not the agents of the insurance company at the time the application for insurance was made, so that their knowledge of the condition and occupancy of the factory, which was the subject of insurance, is imputable to the company, must depend, not alone upon the stipulations in the policy, or whether they held a commission or not, but upon the actual relation which subsisted between the parties as it may be made to appear. It is not believed that the insurance company, by a stipulation in its policy, could appoint agents for the insured, if the facts showed that they were really its agents.

The Board of Commissioners of Henry County v. Murphy.

Upon the face of the policy, if nothing else appeared, it might well be claimed that the brokers were not the agents of the company at that time, as in *Grace v. American Central Ins. Co.*, *supra*; but the stipulation in the policy can hardly be conclusive on that subject.

For the error in overruling the demurrer to the complaint the judgment must be reversed, with directions to the court to sustain the demurrer, and give leave to amend the complaint.

Filed March 12, 1885.

No. 11,940.

THE BOARD OF COMMISSIONERS OF HENRY COUNTY v.
MURPHY.

TAXATION.—Special Assessments.—Omitted Property.—Taxes Paid.—Refunding Amount Paid.—Under the assessment law of December 21st, 1872, and its amendments, special assessments of omitted property were only authorized for the current year, and where such assessments were made for previous years, they were liable to be vacated and set aside upon the application of the taxpayer. But if the taxpayer, without such application, pay the taxes on such omitted property so specially assessed, and thereafter files his claim with the county board to obtain the refunding of the taxes so paid by him, it is not enough for him to show that such special assessments were not authorized by law, but he must also show that the taxes so paid by him were “wrongfully assessed.”

SAME.—Wrongfully Assessed Taxes.—Meaning of.—In such case it is not enough to show that the special assessment of the taxes paid was irregular and unauthorized by law, but it must also be shown that such taxes were wrongfully, that is unjustly, assessed and levied.

SAME.—Sufficiency of Complaint.—Claim under Statute.—Pleading.—In presenting a claim against the county in the commissioners' court, no formal pleading or complaint is necessary; but where the claimant seeks to obtain relief under a statute, he must state such facts in his claim or complaint as will show *prima facie* that he is entitled to such relief.

From the Henry Circuit Court.

J. H. Mellett and *E. H. Bundy*, for appellant.

T. B. Redding, for appellee.

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HOWK, J.—In this case the appellee, Murphy, presented to and filed with the appellant, at its June term, 1883, his claim or complaint, wherein he alleged that theretofore, on the — day of —, 1878, the then auditor of Henry county, by order of the appellant, made an additional assessment of the rights, credits and property of the appellee, and placed the same on the tax-duplicate of such county for the year 1878, as follows, to wit:

For 1872, on \$4,000	personalty, a tax of . . .	\$60 72
For 1873, “ 4,000	“ “ . . .	59 13
For 1874, “ 5,000	“ “ . . .	61 49
For 1875, “ 5,000	“ “ . . .	55 44
For 1876, “ 2,000	“ “ . . .	19 60
For 1877, “ 2,000	“ “ . . .	16 80

Making the total taxes thus assessed and placed upon the tax-duplicate against the appellee amount to the sum of \$273.18; that the appellant ordered and directed such tax-duplicate to be placed in the hands of the treasurer of such county for collection, and ordered such treasurer to proceed at once to collect the taxes so assessed against the appellee; that the county treasurer did proceed and undertake to collect such taxes, and threatened and was about to levy upon and take the appellee's property to make such taxes; and that the appellee was compelled to and did pay the county treasurer, under protest, on February 23d, 1878, in order to save his property from such levy and sale, the amount of the taxes so assessed as aforesaid, to wit, the sum of \$273.18, and caused such treasurer to indorse upon the receipt for such taxes, that the same were paid under protest.

And the appellee averred that the appellant's order requiring the county auditor to enter the taxes so assessed by him against the appellee, upon the tax-duplicate, was illegal, null and void; that the county auditor had no legal right or authority to make such additional assessment of taxes against the appellee, or to enter the same upon such tax-duplicate;

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that the county treasurer had no legal right or authority to demand and collect such taxes from the appellee; that such assessment and taxes were wholly erroneous, wrongful, null and void, and such taxes were illegally, unjustly and wrongfully collected from appellee. Wherefore the appellee demanded that appellant should repay him the amount so paid on account of such taxes, with interest thereon, etc.

The appellant refused to allow appellee the sum demanded, or any part thereof.

Thereupon the appellee duly appealed from the appellant's decision to the court below. There the appellant answered in two paragraphs, as follows: 1. A general denial of the complaint; and, 2. That appellee's cause of action did not accrue within six years before the commencement of this suit. The appellee replied by a general denial to the second paragraph of answer. The issues joined were tried by the court, and a finding was made for the appellee in the sum of \$364.68, and judgment was rendered accordingly.

In this court the appellant has assigned errors as follows:

1. The court erred in overruling its motion for a new trial; and,

2. The appellee's claim or complaint does not state facts sufficient to constitute a cause of action.

In the natural order of things, the second alleged error is first entitled to our consideration, for if the appellee's complaint, challenged as it is for the first time in this court, does not state facts sufficient to constitute a cause of action, it is certain that no valid judgment could be rendered thereon. It is clear, from the averments of his complaint, that the appellee has endeavored to state a case which would entitle him to the relief provided in section 5813, R. S. 1881, in force since July 24th, 1853. In that section, as applicable to the case in hand, it is provided that where any person shall appear before the board of commissioners of any county and establish, by proper proof, that such person has paid any amount of

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taxes which were wrongfully assessed against such person, it shall be the duty of such board to order the amount, so proved to have been paid, to be refunded to such payer from the county treasury, so far as the same was assessed and paid for county taxes. Under this section of the statute, it was necessary that the appellee should state in his complaint such facts as would show, *prima facie* at least, that the amount of taxes which he had paid, and was seeking to have refunded, was "wrongfully assessed" against him. We have given a full summary of appellee's complaint, and the question for our decision may be thus stated: Are the facts averred in this complaint sufficient to show, even *prima facie*, that the taxes which appellee seeks to have refunded were wrongfully assessed against him?

It may be conceded that the county auditor was not authorized, by any statute in force at the time, to make and enter upon the tax-duplicate the assessment of taxes against the appellee set out in his complaint. If this were a suit to vacate such assessment and to enjoin the collection of such taxes, we would be bound to hold, as we have held heretofore, that the assessment was not authorized by law, and that the collection of the taxes ought to be enjoined. *Stockman v. Robbins*, 80 Ind. 195. But the appellee has paid such taxes, and he is now seeking to have the amount of such payment refunded to him. It is certain that if there were no statute authorizing the refunding of the taxes paid, the appellee could not maintain his action; and it is equally certain that in asserting his claim, under the statute, he must show *prima facie* that the taxes, which he has paid and asks to have refunded, were "wrongfully assessed" against him. What is meant by the expression "wrongfully assessed," as used in the section of the statute now under consideration, has recently been declared by this court in the case of *Board, etc., v. Armstrong*, 91 Ind. 528, where it was held, in effect, that a tax might be irregularly and unlawfully assessed, and yet not be "wrong-

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fully assessed," within the meaning of the statute. The same question was again before the court in *Durham v. Board, etc.*, 95 Ind. 182, where, after a reference to the statute, it was said: "An elementary rule is that one who founds a right of action on a statute must make a case within its terms. * * * In order to make a case within the statute, it must be shown, not only that the special assessment was made by an unauthorized person, and in an irregular manner, but also that the property upon which the taxes were laid was not justly subject to the assessment. It is not enough to show that the special assessment was irregular and unauthorized, for it must also be shown that the taxes were unjustly levied. A man can not evade the payment of taxes justly chargeable against him by showing that the wrong person made the assessment."

Every word of this quotation, from the case last cited, is forcibly applicable to the case in hand. In the complaint we are now considering, there is not a fact alleged tending even to show that the appellee was not the owner of all the property mentioned in the special assessment, or that such property was not justly chargeable with all the taxes therein assessed upon it against him. But appellee's whole cause of action, as stated in his complaint, rests upon the naked allegation that the county auditor had no legal right or authority to make such special assessment. Certainly, the appellee has nowhere stated in his complaint any such facts as show, or tend to show, that the taxes, which he paid and asks to have refunded, were "wrongfully assessed" against him, within the meaning of the statute. It is true that in presenting a claim or complaint in the commissioners' court, no particular form is necessary. *Board, etc., v. Ritter*, 90 Ind. 362. But it is equally true that where, as in this case, the claimant seeks to obtain relief under a statute, he must state such facts in his complaint as will show *prima facie* that he is entitled to the relief demanded. *Wright v. Board, etc.*, 98 Ind. 108.

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We conclude, therefore, that the appellee's complaint does not state facts sufficient to constitute a cause of action, or to sustain the judgment of the trial court.

The judgment is reversed, with costs, and the cause is remanded for further proceedings, etc.

Filed March 12, 1885.

No. 11,704.

BAUMGARTNER v. HASTY.

MUNICIPAL CORPORATIONS. — Nuisance. — Wooden Buildings. — A wooden building is not in itself a nuisance, but it may become so when it endangers surrounding buildings, and a municipal corporation may enact an ordinance providing for the summary removal of such a building.

SAME. — Ordinance. — Fire Limits. — A municipal corporation has power to prescribe fire limits, and to prevent the erection of wooden buildings within the prescribed limits.

SAME. — Public Nuisance. — A public nuisance may be summarily abated without notice to the owner of the thing which constitutes the nuisance, provided no unnecessary damage is done to the property.

SAME. — Legislative Power. — The Legislature has power to invest municipal corporations with authority to abate public nuisances without resorting to judicial proceedings.

SAME. — Forfeiture of Property. — A municipal corporation has no power to forfeit the property of a citizen, but the abatement of a public nuisance by the tearing down of a wooden building which constitutes a nuisance is not a forfeiture of property.

SAME. — Inhabitants Compose Corporation. — The inhabitants of the territory embraced within the corporate limits, and not the officers, constitute the corporation.

CONSTITUTIONAL LAW. — City. — Ordinances. — The provisions of the constitution respecting the titles of statutes do not apply to the ordinances of municipal corporations.

SAME. — Incorporation of Prior Ordinances by Reference. — A prior ordinance may be incorporated in a subsequent ordinance and carried forward by appropriate language.

From the Huntington Circuit Court.

B. F. Ibach and L. P. Boyle, for appellant.

J. B. Kenner and J. I. Dille, for appellee.

100	575
150	500
100	575
150	500
100	575
137	53
137	432
138	51
100	575
140	598
142	192
100	575
148	618
100	575
148	25
100	575
155	383
156	642
100	575
160	108
100	575
168	233
168	506
100	575
169	107
169	112

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ELLIOTT, J.—The controlling question in this case arises upon the ruling on the demurrer to the appellant's answer. The appellee's complaint charges that the appellant wrongfully and maliciously destroyed a covering erected over an ice box on the premises of the appellee. The appellant answered by way of justification, alleging that he was the marshal of the city of Huntington; that the appellee was the owner of a lot in that city; that the lot was situated in a part of the city in which the common council had by ordinances prohibited the erection of wooden buildings; that the appellee, in violation of the provisions of the ordinances, did erect a frame building on the lot; that he was requested to remove the building, and refused to do so, whereupon the appellant notified the mayor, in accordance with the provisions of the ordinance, and that officer issued to him a warrant, commanding him to remove the building, and acting under this warrant, he did remove it, using all proper care and doing no unnecessary damage. It is also alleged that the appellant acted without malice in removing the building; that the removal was necessary, because the building was erected in such close proximity to other buildings as to greatly endanger their safety, and that the danger so created was an imminent one.

Two ordinances of the city, duly enacted and published, are set forth. These ordinances contain provisions making it unlawful to erect wooden buildings within the prescribed limits, imposing upon the marshal the duty of notifying the mayor of a violation of the ordinance, and providing that the mayor, upon the report of the marshal, shall issue his warrant to take down and remove the building.

A wooden building is not in itself a nuisance, but when erected in a place prohibited by law, and where it endangers the safety of adjoining property, it may become a nuisance. If the locality and character of such a building do endanger the safety of surrounding buildings, then it may be treated as a nuisance, and a governmental body, having authority to legislate upon such subjects, may prohibit its erection in places

where it would endanger the safety of surrounding property. There are many things that are not nuisances *per se*, but which become such when placed in locations forbidden by law, and where they essentially interfere with the enjoyment of life or property. In a work of excellent standing it is said: "While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect and maintain there a building that is dangerous, by reason of the materials used in, or the manner of its construction, or that is inherently weak or in a ruinous condition and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it." Wood's Law of Nuisance, section 109. It must rest with the governmental authorities of the locality to determine in what places wooden buildings shall not be erected, for courts can not exercise legislative functions in such matters. For the courts to undertake to prescribe in what localities in towns and cities wooden buildings shall be erected, would be to usurp governmental powers which are delegated to the local authorities. It would be to take upon themselves the government of municipal corporations, and this no one will assert they have any right to do. Where, therefore, a valid municipal ordinance prohibits the location of wooden buildings within certain limits, and it appears, as it does here, that the building is located within the prohibited district, and endangers the safety of surrounding property, it may properly be treated as a public nuisance, and as such abated. We are not unmindful of the rule that a municipal corporation has no power to treat a thing as a nuisance which can not be one; but while we recognize this rule, we also recognize the equally well settled rule that it has the power to treat as a nuisance a thing that from its character, location and surroundings, may, and does, become such. In discussing this general subject it was said, in a recent case: "But in

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doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, would be conclusive of the question." *North Chicago City R. W. Co. v. Town of Lake View*, 105 Ill. 207; S. C., 44 Am. R. 788. The chancellor, in the course of a discussion of the question in the famous case of *Hart v. Mayor, etc.*, 3 Paige, 213, said: "It therefore becomes necessary, in all populous towns and crowded harbors, to regulate such matters by police ordinances. And public policy requires that the corporation of the place, or conservators of the port, should not be disturbed in the exercise of those powers, unless they have clearly transcended their authority." Speaking upon the same subject, another court has said: "The proper exercise of the police power and the efficient preservation of the public health could hardly be accomplished, if every individual or any set of individuals can determine what is properly to be regarded as a nuisance and what are measures of salubrity. The various tastes and habits and the conflicting hygienic theories of different persons would, if it were necessary to be guided by them, prevent the municipal authorities from adopting any fixed and certain plan. It is, therefore, right and proper that they should be vested with the authority to decide what comes within the 'legal notion' in that regard." *Mayor, etc., v. Gerspach*, 33 La. An. 1011. But we have not time to make further extracts from the adjudged cases, but content ourselves with referring to some of the many cases in which similar declarations are made: *Baker v. City of Boston*, 12 Pick. 184; *First Municipality v. Blineau*, 3 La. An. 689; *Kennedy v. Phelps*, 10 La. An. 227; *Mayor, etc., v. Hoffman*, 29 La. An. 651.

Our statute grants very comprehensive powers to municipal corporations respecting the abatement of nuisances, and

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if a wooden structure, erected in a place where it endangers surrounding property, can be regarded as a nuisance, there can be no question as to the right of the municipal corporation to cause its removal. But it is settled, without dissent, that without a special grant of authority public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance can not otherwise be abated, may destroy the thing which constitutes it. The authorities do, indeed, go much further, for they declare that it is the duty of the corporation to abate public nuisances. It is one of the oldest of the common law rules, that an individual citizen may, without notice, abate a nuisance, and, if it is necessary to effectually abate it, destroy the thing which creates it. Of the authorities sustaining this doctrine we cite only a few: *Lodie v. Arnold*, 2 Salk. 458; *Hart v. Mayor, etc.*, 9 Wend. 571; S. C., 24 Am. Dec. 165; Viner Abridg. Title Nuisance; 1 Hawkins P. C., chap. 32, s. 12; 3 Black. Com. 5; Broom Com. 222; Cooley Torts, 46; *Northrop v. Burrows*, 10 Abbott Pr. 365; *Jones v. Williams*, 11 M. & W. 176; *Lanfear v. Mayor, etc.*, 4 La. 97; S. C., 23 Am. Dec. 477; *Harvey v. DeWoody*, 18 Ark. 252; *Ferguson v. City of Selma*, 43 Ala. 398; *People v. Vanderbilt*, 28 N. Y. 396; *State v. Flannagan*, 67 Ind. 140; *City of Indianapolis v. Miller*, 27 Ind. 394; *Grove v. City of Fort Wayne*, 45 Ind. 429 (15 Am. R. 262).

These authorities, running back as they do into the early years of the common law, and extending in an unbroken line to the present time, prove that not only may a governmental corporation abate a nuisance by the destruction of the thing constituting it, but so, also, may a private individual. It is, therefore, not the delegation of a new or an extraordinary power to authorize municipal corporations to abate nuisances by removing or destroying the thing which creates it. A man has no right to build a wooden house in a place prohibited by law, and thus endanger the safety of the person or property of others. He has neither a legal nor a moral right to do an

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illegal act on his own premises, which puts in jeopardy the person or property of another. There can be no acquisition of a right by the performance of an illegal act. In removing a building erected in violation of law, and in a situation where it imperils person or property, no private right is invaded, because none could grow out of the illegal act.

There is some conflict in the authorities as to whether a municipal corporation possesses the inherent power to prohibit the erection of wooden buildings within prescribed limits and to cause their removal. Judge Dillon's opinion is that the power does inhere in all municipal corporations, for we find him writing that cities may, "where this is consistent with the general and special legislation applicable to the municipality, establish fire limits, and prevent erection therein of wooden buildings." 1 Dillon's Municipal Corp., 3d ed., sec. 405. The Supreme Court of Michigan, in speaking of ordinances similar to those here under examination, said: "Of the power of the common council to pass the ordinances in question, we have no doubt. They contravene no provision of the constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city." *Brady v. Northwestern Ins. Co.*, 11 Mich. 425. There are other cases sustaining this view. *Wadleigh v. Gilman*, 12 Me. 403; *Mayor, etc., v. Hoffman*, 29 La. An. 651. These cases rest on solid principle, for the rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire. 2 Bacon's Abridg. 147; *Clark v. City of South Bend*, 85 Ind. 276; S. C., 44 Am. R. 13; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, see p. 669; 2 Kent Com. 339. The exercise of such a power is not the exercise of a new power, nor of one not connected with the purposes for which public corporations are organized; on the contrary, it is the exercise of a power long possessed by municipal corporations and closely connected with the purposes for which such corporations are organized. In speaking of ordinances much the same as those here under discussion, it

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was said in *Mayor, etc., v. Hoffman, supra*, "No town or city, compactly built, can be said to be well ordered or well regulated which neglects precautions of this sort. It is its duty to the public to take such measures as may be practicable to lessen the hazard and danger of fire." A legislative act granting authority to take precautions against fire, and ordinances passed under such an act authorizing the removal of wooden structures erected within forbidden limits, are little more than express declarations of the existence of powers which existed at common law, and are necessarily implied in the grant of a charter to a city.

There are very many provisions in the general act for the incorporation of cities conferring authority upon the common council of cities to enact ordinances to secure protection against fire, and these provisions taken, as they must be, as parts of one uniform system, leave no doubt in our minds that the Legislature meant to invest cities with authority to enact such ordinances as were reasonably necessary to prevent the destruction of property by fire. In the enumeration of the powers of the common council, there is an express grant of power, and when this provision is read in connection with the other provisions of the act, it is very clear that the whole power of enacting ordinances upon the subject is vested in the common council. It is quite certain that the common council is the only branch of municipal government invested with legislative functions, and it would be unreasonable to hold that any other than the legislative body could enact ordinances.

There is little, if any, conflict in the decisions upon the question of the validity of ordinances passed under express legislative authority fixing limits within which wooden buildings shall not be erected; the conflict among the cases is upon the question whether the municipal corporation possesses the power to enact such ordinances without express legislative authority. Even in Pennsylvania, where a narrow view is taken of the general subject, such ordinances have been sustained,

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and in a recent case it was said: "It is true that a wooden building, though erected contrary to law, is not *per se* a public nuisance. But it may become such by the manner in which it is used or allowed to be used." At another place, in the same opinion, it was said, in speaking of the buildings of the plaintiff: "The city of Philadelphia was the owner of large and valuable property in their neighborhood. Any hour of the day or night they were in danger of being set on fire by those who frequented them with the owner's permission. It is stated as a fact in the special plea, and of course a fact admitted by the agreement, that the public safety was imperilled. Nothing more was necessary to justify the action of the defendant." *Fields v. Stokley*, 99 Pa. St. 306; S. C., 44 Am. R. 109.

In the case before us the answer avers, and the demurrer admits, that the location of the appellee's building was such as to put surrounding property in imminent danger, so that the case falls fully within even the narrow rule of the Pennsylvania court. In the early case of *Respublica v. Duquet*, 2 Yeates, 493, the Legislature authorized the municipal corporation to prevent the erection of wooden buildings, and an ordinance enacted pursuant to this law was held valid. The subject received very full consideration in *King v. Davenport*, 98 Ill. 305 (38 Am. R. 89), and it was held that an ordinance providing for the summary destruction of a wooden building erected within forbidden territory was valid. In the course of the opinion it was said: "There can be no doubt, it seems to us, that the ordinance in question was a police regulation, proper, and made in good faith, 'for the purpose of guarding against the calamities of fire' in a populous neighborhood; and we must regard it as an entirely reasonable regulation. There is no more frequent or admittedly proper exercise of the police power, than that of the prohibition of the erection of buildings of combustible materials in the populous part of a town, and the only means of making such prohibition effectual is by a summary abatement. Every moment's delay in the

removal of the nuisance is constant exposure to danger. Before any judicial hearing could be had in the matter, the whole evil sought to be guarded against might be produced." It was also held in that case, that the erection of a wooden building in a forbidden place created a nuisance, which might be summarily abated, the court saying: "But what is a nuisance at common law? Blackstone's definition is, whatsoever unlawfully annoys or doth damage to another, is a nuisance."

We can not take time to quote further from the adjudged cases upon this phase of the case, but content ourselves with referring to the reasoning in the cases already referred to upon another feature of the case, and to the cases of *Corporation of Knoxville v. Bird*, 12 Lea (Tenn.) 121; *City of Salem v. Maynes*, 123 Mass. 372; *Field v. City of Des Moines*, 39 Iowa, 575; S. C., 18 Am. R. 46.

The case principally relied upon by the appellee is that of *Kneedler v. Borough of Norristown*, 100 Pa. St. 368; S. C., 45 Am. R. 383. That case concedes that where the Legislature authorizes the municipal corporation to enact ordinances such as those under examination, they are valid; so that, conceding it to be well decided, it does not sustain the judgment below.

The removal of a building, erected in defiance of law in a place where it endangers surrounding buildings, is not the forfeiture of property; it is the exercise of a police power, and is not a declaration of forfeiture. The removal of the building, or its demolition, may cause loss to the owner, but there is no forfeiture of it to the public, or to any one else. We have seen that the rule has been for hundreds of years, that property may be destroyed if it creates a public nuisance in cases where the nuisance can not be effectually abated in any other way. A striking illustration of this general doctrine is found in the case of *Meeker v. Van Rensselaer*, 15 Wend. 397, where it was held lawful for an officer acting under a board of health to tear down a tenement house cut up into small apartments, and calculated to breed disease. There are cases

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by the scores in the books affirming the general doctrine, and we suppose that until the decision in *Kneedler v. Borough of Norristown*, *supra*, no one thought of treating the destruction of property constituting a nuisance as a forfeiture. Certainly, individuals have no right to pronounce forfeitures, and yet they may destroy property when necessary for the abatement of a public nuisance. It is inconceivable, therefore, that the act of removing or destroying a building to prevent the hazard of fire can be regarded as constituting a forfeiture. The real ground upon which the right rests is that stated in *Field v. City of Des Moines*, *supra*, where MILLER, C. J., in delivering the opinion of the court, said: "That any person may 'raze houses to the ground to prevent the spreading of a conflagration,'" without incurring any liability to the owner of the houses destroyed, is a doctrine well established in the common law. The maxim of the law is that "a private mischief is to be endured rather than a public inconvenience." 2 Kent Com. 338. Lord Coke says: "For the commonwealth a man shall suffer damage; as to the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do without being liable to an action." The general principle which authorizes the destruction of buildings to stay the progress of a conflagration, unquestionably authorizes the enactment of laws for the prevention of danger from fire. The question is much less doubtful in a case like this, where the building is constructed in defiance of law, than in a case where the building was lawfully erected, and its destruction made necessary by subsequent events. The general question here involved was discussed in the celebrated *Slaughter-House Cases*, 16 Wall. 36, where many instructive cases are gathered together, and it needs no extended discussion from us. The point which is here the decisive one was admirably discussed by the court in *Vanderbilt v. Adams*, 7 Cowen, 349, and from that decision we take this forcible statement of the conclusion reached after a review of the cases: "The owner of a lot in a city intends to build of wood; the

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constituted authorities say, ' You must not exercise that right ; it is dangerous to all. You may build of brick or stone ; because the safety of all is, in this way, promoted.' Can the owner, with impunity, violate such a law, because he has the absolute right of property ? It has not been heretofore so considered."

A municipal corporation is composed of the inhabitants of the territory over which its limits extend, and not of the officers. It is an instrumentality of local government, and every voter is a participant in the governmental affairs of the corporation. There, as elsewhere in free governments, the majority rule, and the officers elected are the representatives of the citizens, and their official acts are the expressions of the public will. *Strosser v. City of Fort Wayne*, ante, p. 443 ; *City of Valparaiso v. Gardner*, 97 Ind. 1 (49 Am. R. 416) ; 1 Dillon Mun. Corp. (3d ed.), section 40. It is, therefore, the citizens themselves who fix the limits within which the erection of wooden buildings shall be prohibited, and if there is any fear of oppression, that fear must be that the people invested with the right of local government will oppress themselves, for the power is in their own hands. But it is not oppressive for the majority of the corporators, acting through their representatives, to prescribe fire limits. The citizen who denies that right is the one who manifests a spirit of oppression, for he would, if he could, sacrifice the public safety to his selfish interests. It is more just and more expedient, that the will of the majority of the citizens, lawfully expressed, should govern, than that one man should rule because it promotes his private interest.

The constitutional provisions respecting the titles of acts of the General Assembly, and like matters, do not apply to the by-laws of municipal corporations. *Green v. City of Indianapolis*, 25 Ind. 490.

The first ordinance defining the fire limits was passed on the 31st day of January, 1880, and by an ordinance adopted in March, 1881, it was ordained that in addition to the territory included within the fire limits prescribed by the former ordinance, it should be unlawful to erect a wooden building

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within the territory added to the limits by the last ordinance. In the later ordinance is the following provision: "And all the provisions of an ordinance passed on the 31st day of January, 1880, by the common council of the city of Huntington, and any provisions thereof, shall be extended over and apply to the territory included in this ordinance." We have no doubt as to the validity of both these ordinances, and that the clause of the last ordinance does bring the territory described in it within the provisions of the earlier. The effect of the language employed is to enact that the provisions of the earlier ordinance shall be extended to new territory. We have in our statutes scores of instances in which legislation of the same general character was adopted in substantially the same method. It has, indeed, been held in several cases that a statute may be carried forward by reference to the general subject. *Opp v. TenEyck*, 99 Ind. 345, and cases cited. If the Legislature of a State were required to embody every act referred to in the act making the reference, it would soon be true that "of making many books there is no end."

Judgment reversed, with instructions to overrule the demurrer to the answer, and to proceed in accordance with this opinion.

Filed March 13, 1885.

No. 11,379.

WOODWARD ET AL. v. McLAREN.

MECHANIC'S LIEN.—*Furnishing Materials to Contractor.—Repair of Building.*—

Under sections 647 and 648, 2 R. S. 1876, p. 266 (see, also, sections 5293 and 5294, R. S. 1881), no lien can be obtained on a building for materials furnished therefor to a contractor, to be used in repairing the same, under a contract to which the owner is not a party. Nor does the fact that the owner knew that the materials used in repairing the building were being purchased by the contractor from the party who asserts the lien, tend, in such case, to establish any claim against the premises.

From the Marshall Circuit Court.

Woodward et al. v. McLaren.

A. C. Capron, for appellants.

J. D. McLaren, for appellee.

NIBLACK, J.—This was an action to enforce what was claimed to be a lien for material furnished for the repair of a house. Upon the pleadings there was final judgment upon demurrer for the defendant.

The facts, as they are either expressly or impliedly admitted by the pleadings, may be summarized as follows: On the 21st day of July, 1882, one Perkins entered into a written agreement with Susan McLaren, the defendant, for the repair of a dwelling-house belonging to the latter, and situate on the east half of lot No. 46, in the city of Plymouth, in Marshall county, by which it was agreed that Perkins should, within thirty-five days thereafter, do certain specified repairs upon the house for the gross sum of two hundred dollars, to be paid upon the completion of the work, he to furnish all the materials necessary for the repairs thus agreed to be made. On the day following Perkins contracted with Norman S. Woodward and John B. Chambers, partners doing business under the firm name of Norman S. Woodward & Co., for all the brick necessary to be used in repairing the house under his contract with Mrs. McLaren. In pursuance of their contract with Perkins, Norman S. Woodward & Co. soon afterwards delivered to him brick, amounting in value to the sum of \$49.35, which were used by him in making the repairs upon the house which he had undertaken to make. Upon the completion of the repairs on the house, which was accomplished within the time limited for their completion, Mrs. McLaren paid to Perkins the sum of \$200, which was understood to be in full of all the work done and materials furnished by him. Perkins having failed to pay Woodward & Co. for the brick which were put into the house, the latter demanded payment of Mrs. McLaren, which was refused. They thereupon, on the 26th day of August, 1882, filed a notice in the recorder's office of Marshall county of their

Woodward *et al.* v. McLaren.

intention to hold a lien on the house and lot on which it stands for the value of the brick, which notice was duly recorded in the proper mechanics' lien record.

Woodward & Chambers, claiming to have thus acquired a lien upon the house and lot, brought this action against Mrs. McLaren to enforce their claim against the property, and the circuit court held that they were not entitled to recover upon the facts as we have herein above stated them.

So much of the code of 1852 as authorized the taking and enforcing of liens for work done or material furnished, in the construction or repair of buildings, was continued and remained in force until new legislation on the subject intervened on the 6th day of March, 1883. Acts 1883, p. 140.

Section 647 of that code, 2 R. S. 1876, p. 266, declared mechanics and material men to be entitled to take and hold such a lien on the building and on the interest of its owner in the lot or ground on which it stood. See, also, R. S. 1881, section 5293. Section 648 of the same code enacted in effect that the provisions of section 647 should only extend to work done on, or materials furnished for, new buildings, or to a contract entered into with the owner of any building for repairs. See, likewise, section 5294, R. S. 1881.

As is plainly apparent, the brick which went into the building in this case were furnished under a contract with Perkins, who had obligated himself to provide all the necessary materials, and consequently not under any contract with Mrs. McLaren as the owner of the building. The facts of this case, therefore, did not bring it within the provisions of sections 647 and 648, *supra*, and hence no lien resulted in favor of the plaintiffs from the notice which they caused to be filed and recorded in the recorder's office. Conceding that Mrs. McLaren knew that the brick used in repairing her building were being purchased by Perkins of the plaintiffs, that fact did not, under the circumstances, tend to establish any claim against her house and lot, since she was in no legal sense a party to the contract under which the brick were furnished.

Klinesmith v. Socwell.

The views we have expressed are fully sustained by the cases of *Wilkerson v. Rust*, 57 Ind. 172, and *McCarty v. Burnet*, 84 Ind. 23.

The judgment is affirmed with costs.

Filed March 19, 1885.

No. 12,041.

KLINESMITH v. SOCWELL.

MARRIED WOMAN.—*Alienation of Land Acquired by Previous Marriage.*—*Partition.*—*Husband and Wife.*—Although a married woman can not, during the existence of a second or subsequent marriage, alienate real estate acquired and held by her in virtue of a previous marriage, yet, if the real estate so acquired and held by her is an undivided share or interest in the lands of her previous husband, she is entitled to have such share or interest set off to her in severalty, and, to that end, she may bring and maintain an action of partition against the owner or owners of the residue of such lands.

SAME.—*Lands not Susceptible of Division.*—*Order of Sale.*—*Distribution of Proceeds.*—*Estoppel.*—Where, in such suit, it is ascertained or found by the court that the lands of the previous husband are not susceptible of division between the parties, without damage to their respective interests therein, the court may lawfully order and decree the sale and conveyance of such lands during the existence of such second or subsequent marriage, so as to vest in the purchaser and grantee the fee simple estate in the share or interest therein which descended to such married woman as the widow of her previous deceased husband; and upon such sale and conveyance, the proceeds of the share or interest of such married woman in the lands of her previous husband must be paid to her unconditionally, and thereafter she will be estopped from asserting, as such widow, any further title, claim or interest in or to such lands.

From the Marion Superior Court.

G. W. Galvin, for appellant.

F. M. Finch and *J. A. Finch*, for appellee.

Howk, J.—This was a suit by the appellant against the appellee to obtain the partition of a certain lot in the city of Indianapolis, and to quiet her title to her share thereof. In her complaint the appellant alleged that she was the owner

100	589
126	115
100	589
153	67

Klinesmith v. Socwell.

in fee simple of an undivided one-third part, and the appellee was the like owner of the residue of the lot in controversy. Appellee answered specially, in a single paragraph, to which the appellant's demurrer, for the alleged want of facts, was overruled by the court. She then replied in a single affirmative paragraph, to which reply the appellee's demurrer, for the want of sufficient facts, was sustained by the court. Appellant declined to amend her reply, or to plead further, and judgment was rendered that she take nothing by her suit, and that appellee recover of her his costs. On appeal the general term affirmed the judgment of the special term, and from the judgment of affirmance this appeal is now here prosecuted.

The first error of which complaint is here made by the appellant in argument is the overruling of her demurrer to appellee's answer.

The appellee alleged in his answer, that theretofore, on the 6th day of October, 1876, the appellant in this cause filed her complaint in the Marion Superior Court against one Christian Klinesmith and Henry Neumeyer, as defendants, to obtain the partition of the same lot now in controversy; that in her complaint in her former suit the appellant alleged that, as the widow of one Anthony Lohman, who had died seized of the lot in controversy, she was entitled to the one-third part of such lot, and as the mother of Ida Lohman, a daughter of said Anthony Lohman, who had died intestate and without issue, she had inherited from Ida another interest in such lot, and as the mother of Florinda, another daughter of Anthony Lohman, who had intermarried with Henry Neumeyer and had died intestate and without issue, she had inherited another interest in such lot; that the defendant Christian Klinesmith had become the owner in fee of the interest in such lot of Louisa Iske, another heir of Anthony Lohman, deceased; and appellant demanded partition of the lot between herself and the defendants Christian Klinesmith and Henry Neumeyer, who were alleged to be the owners of the entire lot, and that her interests in the lot be set off to her in

Klinesmith v. Socwell.

severalty, etc. ; that such proceedings were had in such former suit as that the defendants therein appeared in open court, and, by their pleadings, joined issue on appellant's complaint therein, which issue was then submitted for trial and determination to such superior court ; that on such trial the court found that the facts, as alleged in such complaint, were true, and that the lot in controversy could not be divided between such owners without injury to their interests therein ; that thereupon the court ordered that the lot be sold, and that the proceeds of the sale be divided between the parties to such suit, according to their respective interests in the lot, after paying all claims against the estate of Anthony Lohman, deceased ; that the court appointed a commissioner to make such sale, upon the terms and conditions prescribed in such order, and in accordance therewith such commissioner, on the 7th day of April, 1877, sold such lot to Henry M. Socwell, the appellee in this action ; that such sale was approved by the court, and a deed of conveyance of the lot was by the court ordered to be and was made by the commissioner, and, having been approved by the court, was delivered to the appellee in this cause ; and the appellee averred that under such deed he entered into and then held possession of the lot in controversy. Wherefore, etc.

It is claimed by appellant's counsel, as we understand his argument, that appellee's answer was bad on the demurrer thereto, because it shows upon its face that appellant's interest in the lot in controversy came to her by descent, as the widow of her first husband, Anthony Lohman, deceased, and that at the time of the institution of her first suit for partition, and during its pendency, and at the times of the sale and conveyance of the lot to the appellee Socwell, under the orders of the court in her first suit, the appellant was under the disability of her second marriage to Christian Klinesmith. Counsel concedes, as we understand him, that, notwithstanding the pendency of her second coverture, the appellant had the right to institute her first action in partition, for the severance of

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her interests in the lot from the shares of the other owners thereof. It was so held by this court, and correctly so we think, in *Christy v. Smith*, 80 Ind. 573. But counsel goes further, and assumes the position that when it was found by the court that the lot was not susceptible of division between the parties to the first suit, without damage to their respective interests, the court could not by its decree authorize the sale and conveyance of the lot during the second coverture, so as to vest in the purchaser and grantee the fee simple estate in the one-third of the lot which descended to her as the widow of her first husband, Anthony Lohman, deceased. Counsel makes an able and forcible argument in support of his position. It is enough for us to say, however, that under the previous and uniform decisions of this court, his position can not be maintained. *Finch v. Jackson*, 30 Ind. 387; *Small v. Roberts*, 51 Ind. 281; *Swain v. Hardin*, 64 Ind. 85.

In the case in hand, the appellant was the owner in fee, at the time of her first partition suit, of other interests in the lot in addition to the one-third thereof which descended to her from her first husband, which other interests she inherited from her deceased children. As to these other interests, her power of alienation was in no manner suspended by her second coverture; and as to them she had the undoubted right, notwithstanding the second coverture, to institute and prosecute her suit for partition, and, as the lot was not susceptible of division, to demand judgment for the sale thereof. The lot was sold at appellant's suit, and by her procurement, to the appellee, Socwell, as appears from exhibits copied into the record, for more than \$4,600, of which sum the appellant appears to have received more than \$1,700. With this amount of appellee's money in her hands, for her share of the lot, it seems to us that the appellant is and ought to be estopped, in equity and good conscience, from asserting any further title, claim or interest in or to the lot in controversy as against the appellee.

We conclude, therefore, that the court committed no error in overruling the appellant's demurrer to appellee's answer.

What we have said in considering the sufficiency of the answer necessarily leads to the further conclusion that the court did not err in sustaining appellee's demurrer to appellant's reply.

Filed March 17, 1885.

WARREN ET AL. v. FARMER ET AL.

100	500
121	100
100	500
126	647
100	503
147	319
100	508
152	457
100	500
155	542

SAME.—Where the partner so purchasing dies, partnership creditors may file their claims against, and participate on equal terms with individual creditors in, his estate. **ZOLLARS, C. J.**, dissents.

J. R. Fritts, J. H. Loudon and R. W. Miers, for appellants.
J. B. Mulky, for appellees.

Upon a second trial it was made to appear that the firm of Farmer & Williams was dissolved about the year 1860. Farmer purchased the interest of Williams in the partnership property, and as part consideration for the purchase assumed the payment of the partnership debts. Among the debts was a note due to the appellants, which was filed as a claim against the estate of Farmer, who died in 1877. The case was re-

Warren et al. v. Farmer et al.

ferred to a master commissioner to take the testimony, and upon the evidence so taken the court made a general finding in favor of the claimants, that there was due them the sum of \$191.63, and upon this finding there was a judgment that they should be allowed the sum above stated, "payable out of the assets of said estate."

Subsequently, at the same term of court, the judgment, on motion of the appellees, was so modified that the sum found due was ordered to be paid "out of any assets remaining after paying the individual debts of John E. Farmer, deceased." This appeal is brought to set aside this last order, and to remit the appellants to their rights as upon the first order.

That individual creditors are entitled to be paid out of the individual assets of a deceased partner's estate in preference to the claims of creditors of the firm of which he was a member, is not disputed.

The question for decision is, did the fact that Farmer purchased the interest of Williams in the partnership assets, and in consideration of such purchase assumed the payment of the partnership debts, make the partnership assets the individual assets and the debts the individual debts of Farmer, so as to take the case out of the general rule?

It does not appear from the evidence whether the assets of Farmer's estate are sufficient to pay his individual debts or not, nor whether there are any individual creditors or not, but it is shown that more than twenty years before this claim was filed in the court below, Farmer purchased Williams' interest in the firm property and assumed the payment of the debts, and that long before his death he sold what formerly was the partnership property and quit the business. So that for twenty years and more there has been no partnership property. Inferentially it appears that Williams, the surviving partner, is insolvent.

The rule that partnership creditors can not resort to the individual property of a partner for payment of a partnership debt, until the individual creditors are first satisfied, seems to

have been established as a measure of compensation for the other rule, that partnership creditors had the primary right to satisfaction of their debts out of the partnership property. It is a rule of equitable cognizance, and the reasons for it are elaborated in many cases, and among others in *Weyer v. Thornburgh*, 15 Ind. 124, and in *Black's Appeal*, 44 Pa. St. 503. A qualification of the rule is stated in some cases, to the effect that where there is no joint property, and no living solvent partner, the joint creditors are entitled to share the individual property, *pari passu*, with the separate creditors; but this qualification was considered by the learned judge who delivered the opinion in *Weyer v. Thornburgh*, *supra*, and repudiated.

It may be taken as the settled law in this State, that even though there are no partnership assets and no solvent partners, partnership creditors can not participate with individual creditors in the individual estate of a deceased partner. This rule is supported by the weight of authority and the better reason. But we think the case before us is neither within the general rule nor the qualification. It is not perceived how either can be invoked in a case like this, where one partner has transferred all the partnership assets to the other, who, in consideration of such transfer, has assumed the payment of the firm debts.

By the transfer of the partnership property by one partner, in good faith, to the other, such property becomes the individual property of the remaining partner, and is at once subject to seizure by his individual creditors; and in the case before us, for all that appears, the very assets which the administrator of Farmer is administering may have been derived from the sale of the partnership property. If the partnership creditors, whose claims the decedent agreed to pay, are now postponed, it may result that the individual creditors will receive their pay from assets derived from the property originally furnished by the partnership creditors. Such a result would hardly find warrant in a doctrine of equity.

Warren et al. v. Farmer et al.

The contract of Farmer to pay the partnership liabilities, being founded on a valid consideration, made the debts his individual obligations. *Hayden v. Cretcher*, 75 Ind. 108. In effect, Williams, as between Farmer and himself, had paid his share of the partnership liabilities by the transfer of the partnership property, and thereafter he stood in equity merely as surety for Farmer, with all the rights of a surety, as to all creditors who knew of the arrangement. *Williams v. Boyd*, 75 Ind. 286.

The agreement of Farmer to pay the firm debts inured to the benefit of the creditors of Farmer & Williams, and such creditors, under the decisions of this and other courts, could have proceeded in equity at once to enforce their claims against him.

Under such circumstances, no valid reason can be suggested why a court should now interpose to defeat a clear equitable right of these claimants. That the promise made by Farmer to Williams inured to the benefit of the creditors of Farmer & Williams, has been ruled in *Devol v. McIntosh*, 23 Ind. 529, *Rodenbarger v. Bramblett*, 78 Ind. 213, *Cross v. Truesdale*, 28 Ind. 44, *Bird v. Lanius*, 7 Ind. 615, *Davis v. Calloway*, 30 Ind. 112, *Dunlap v. McNeil*, 35 Ind. 316, and many other cases.

Upon principles of equity, the debt, as we have before stated, became the individual obligation of Farmer, and the creditors of Farmer & Williams had at least the equitable right to treat Farmer as individually liable to them on his promise to Williams for their benefit. Where a promisor receives property or a fund with which to make payment, and, in consideration of the transfer to him of such property or fund, promises to pay debts owing to third persons, the American doctrine is that such promise may be enforced by those for whose benefit it was made, and this fact is regarded as controlling in producing the result that thenceforth those who were previously creditors of the firm become individual creditors as well, and entitled to share in the estate of the con-

tracting partner. *Matter of Downing*, 1 Dillon, 33; *In re Downing*, 3 Nat'l Bank. Reg. 748; *In re Long*, 9 Nat'l Bank. Reg. 227; *In re Rice*, 9 Nat'l Bank. Reg. 373.

"Partnership creditors have no lien upon partnership property; their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners." So, when Williams sold the assets to Farmer, the lien of the partnership creditors was gone; they had no greater rights in the partnership assets than Farmer's individual creditors. Farmer, having by his assumption made what before had been the debts of the firm his individual debts, it would result, nevertheless, that if the partnership creditors are now postponed, they might, without fault, lose their claims entirely, while the individual creditors would derive the benefit of what had been partnership assets. *Trentman v. Swartzell*, 85 Ind. 443; *Barkley v. Tapp*, 87 Ind. 25.

The equitable rule seems to be, that after the sale and assumption, both the individual and partnership debts are alike individual debts, and stand at the same level.

This question was not made when the case was here before, and the cases are not to be regarded as in conflict.

The case of *Robb v. Mudge*, 14 Gray, 534, which seems to hold a contrary doctrine, was put upon the ground, mainly, that the agreement of the remaining partner to pay the firm debts did not inure to the benefit of the firm creditors. Besides, this case has been disapproved by Judge BLATCHFORD in one of the cases above cited.

Under the ruling in *Olleman v. Reagan*, 28 Ind. 109, if Williams had paid the partnership debts, no doubt could be entertained but that he would have been entitled to prove them against his deceased partner's estate, on the ground, as is there stated, that they would then have become individual claims in his favor against his partner's estate. As we have before observed, Williams did, in effect, pay his share of the firm debts, by the transfer to Farmer of the firm property,

Fenton v. The State.

and under the principles determined in that and the other cases cited above, the debts then became, both as between Williams and Farmer, and their creditors, at their election, the individual debts of Farmer, and it was, therefore, error for the court to modify the judgment.

The judgment is reversed, with costs, and remanded for trial.

ZOLLARS, C. J., dissents, on the ground that the case is not such as authorizes the appellant to share equally with the individual creditors of the decedent. The individual creditors have rights that can not be overthrown by the partners.

Filed March 17, 1885.

No. 12,046.

FENTON v. THE STATE.

INTOXICATING LIQUOR.—*Judicial Knowledge.*—*Blackberry Brandy.*—Courts take judicial notice that brandy is an intoxicating liquor, and the addition of the word "blackberry" to the word "brandy" merely designates a particular kind of brandy.

SAME.—*Sale on Sunday.*—*Evidence.*—*Presumption.*—Evidence that blackberry brandy was sold is sufficient to sustain a conviction for selling intoxicating liquor on Sunday, as the presumption is that the basis of the liquor was brandy.

From the Hamilton Circuit Court.

W. Garver and *F. B. Pfaff*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

ELLIOTT, J.—The evidence in this case shows that the appellant sold to James Frost less than a quart of blackberry brandy on Sunday, the 20th day of July, 1884, but does not show, in direct terms, that the liquor was intoxicating. The appellant insists that he is entitled to a reversal, for the reason that it was not proved that the liquor sold by him was intoxicating. We can not concur in this view.

Ex Parte Kendall *et al.*

Brandy is ranked as an intoxicating liquor by writers upon the general subject, and that it is a liquor of that character is generally and commonly known. The fact is, therefore, one of which the courts will take judicial knowledge. The addition to the term "brandy" of the word "blackberry" does no more than designate it as a particular kind of brandy; it does not indicate that the liquor was not brandy of some kind. The natural and reasonable presumption is that the basis of the liquor was brandy, and therefore intoxicating. If it was not the appellant should have shown it. This general subject was so thoroughly examined in *Myers v. State*, 93 Ind. 251, that there is no necessity for further discussion. That case, it is proper to add, was followed in the recent cases of *Mullen v. State*, 96 Ind. 304; *Stout v. State*, 96 Ind. 407.

We can not reverse the judgment, because the trial court believed the testimony of the witness Frost, and did not believe that given by the appellant.

Judgment affirmed.

Filed Feb. 20, 1885.

No. 12,172.

EX PARTE KENDALL ET AL.

CRIMINAL LAW.—*Murder.—Admission to Bail.—Habeas Corpus.—Supreme Court.—Practice.*—In a proceeding by *habeas corpus* by a party indicted for murder to be admitted to bail, the Supreme Court, upon appeal by the petitioner, will examine and pass upon the evidence.

SAME.—*Burden of Proof.*—An indictment for murder implies *prima facie* that the accused has no right to bail, and the burden is upon him to show that the proof of his guilt is not evident, and that the presumption of his guilt is not strong.

From the Dubois Circuit Court.

W. A. Traylor, W. S. Hunter and C. H. Mason, for appellants.

F. T. Hord, Attorney General, J. L. Bretz, Prosecuting Attorney, and O. A. Trippet, for the State.

100	500
124	111
100	500
137	93
100	500
147	29

Ex Parte Kendall *et al.*

ZOLLARS, C. J.—Being charged in an indictment with murder in the first degree, appellants were committed and are held in jail. By a proceeding in *habeas corpus*, instituted in the court below, they sought to be admitted to bail. Upon the hearing this was refused, and they were remanded into custody. They appeal. The case is before us upon the evidence, and it is our duty, in a case of this kind, to examine and pass upon it. *Ex Parte Heffren*, 27 Ind. 87; *Ex Parte Sutherlin*, 56 Ind. 595; *Ex Parte Walton*, 79 Ind. 600.

An indictment for murder duly returned implies *prima facie* that the parties indicted have no right to bail. *Ex Parte Jones*, 55 Ind. 176. The burden is upon appellants to show that the proof of their guilt is not evident, and that the presumption of their guilt is not strong. *Ex Parte Jones, supra*; *Ex Parte Heffren, supra*.

Following the oral testimony of the witnesses, there is in the bill of exceptions a statement by the prosecuting attorney that one of the State's witnesses was absent, and also a statement as to what the testimony of the witness would be if present. Without establishing any rule to be followed generally in cases of this character, we have, for the purposes of this case, considered what the absent witness might testify to, as stated by the prosecuting attorney, in connection with the other testimony upon the hearing. Thus considering it, and all the testimony upon the hearing, and applying the above rules to the case, we are of the opinion that appellants should have been admitted to bail.

It is not necessary for us to extend this opinion by setting out the evidence. We know of no good purpose that will be subserved by doing so. Inasmuch as the parties are yet to be tried upon the merits of the case, it seems more proper that the evidence should not be set out.

The judgment is reversed, with instructions to the court below to admit appellants to reasonable bail.

Filed March 14, 1885.

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BAILMENT.

1. *Warehouseman.—Evidence.—Unsigned Memoranda.*—In an action against a warehouseman to recover for damages to eggs stored in his warehouse, unsigned slips of paper upon which were written by plaintiff's employees the number and quality of eggs in each barrel when stored, and also the relative number of good and bad eggs when they were withdrawn from storage, and which were then reported to plaintiff's book-keeper, and a synopsis of each entered upon his books, do not constitute the best evidence of such facts, and parol evidence thereof is admissible. *Adams v. Sullivan, 8*

2. *Same.—Measure of Damages.—Instruction.*—In such case, an instruction, which, in effect, tells the jury that in making up the amount of damages, in the event of a finding for the plaintiff, the eggs should be estimated at the highest market price which the plaintiff could have obtained for them, at the time they were injured, is erroneous, as they should be estimated according to their market value in the locality where they were injured, and, if the time be indefinite and the market fluctuating, the average range of prices would be the proper standard of their market value. *Id.*

BANK CHECK.

1. *Definition.—Bill of Exchange.*—When properly filled out with the date, amount, the names of drawer and payee, the following is a banker's check, and not an ordinary bill of exchange: "Indianapolis, Ind., _____, 1883. No. _____. Pay to the order of _____, _____ dollars. _____, Cashier. To the United States National Bank, New York." *Harrison v. Wright, 515*
2. *Same.—Force and Effect of Such Check.—Assignment.—Insolvent Drawer.—Preferred Creditor.*—Such a check, drawn upon the drawer's banker without words of transfer, and drawn upon no particular designated fund, does not, of itself, either as between the drawer and drawee, or drawer and payee or holder of the check, operate as an appropriation or equitable assignment of a fund in the hands of the drawee. Nor does it operate as an assignment of a part of the drawer's chose in action against the drawee; and hence the holder of such a check is not entitled to a preference as against the depositors and general creditors of an insolvent drawer. For the reasons upon which this ruling is based, and an extended review of the authorities, see the opinion. *Id.*

BANKRUPTCY.

See JURISDICTION.

BANKS AND BANKING.

See BANK CHECK.

BILL OF EXCEPTIONS.

See JUDGMENT, 3; MASTER COMMISSIONER; SUPREME COURT, 1, 2, 5, 6, 8, 9, 14.

1. *Instructions.—Practice.*—Under the code of 1852, a cause was tried at the May term, and a motion for a new trial overruled at the October term, when sixty days' time was given in which to file a bill of exceptions, which was filed accordingly.

Held, that this bill could not bring into the record instructions or exceptions thereto. *Hereth v. Hereth*, 35

2. *Must be Presented to Judge within Time Given.*—Where time was given to file a bill of exceptions, and the bill was not presented to the judge within the time, the bill is no part of the record. R. S. 1881, section 629. *Ford v. Griffin*, 85

BILL OF EXCHANGE.

See BANK CHECK.

BONA FIDE PURCHASER.

See FRAUD; STARE DECISIS; VENDOR AND PURCHASER.

BURDEN OF PROOF.

See CRIMINAL LAW, 19; NEW TRIAL, 13; LIFE INSURANCE, 7.

CASES DISAPPROVED AND LIMITED.

Board, etc., v. Reissner, 58 Ind. 260, and *Board, etc., v. Reissner*, 66 Ind. 568, as to compensation of sheriff, limited. *Bynum v. Board, etc.*, 90

Fetrow v. Wiseman, 40 Ind. 148, as to right of infant to disaffirm contract, disapproved. *Clark v. VanCourt*, 113

CHANGE OF VENUE.

See JUDGE.

Practice.—Delay.—Where a motion for a change of venue from the county is supported by a proper affidavit, but the counsel presenting the motion states in open court that the purpose of the motion is delay, the motion should be struck from the files. *Chissom v. Barbour*, 1

CHATTEL MORTGAGE.

See EVIDENCE, 3; FRAUD; PARTNERSHIP, 1; PRINCIPAL AND SURETY, 2 to 5.

CHOSE IN ACTION.

See BANK CHECK; REAL ESTATE, ACTION TO RECOVER, 1.

CIRCUIT COURT.

See DRAINAGE, 13, 14; HIGHWAY, 1.

CITY.

See INJUNCTION, 1; NUISANCE; STATUTE, 1, 2.

1. *Municipal Corporation.—Law of Incorporation.—Ordinances.—Fire Board.—Delegation of Powers and Duties.—Chief Engineer of Fire Department.*—The common council of a city, incorporated under the general law of this State for the incorporation of cities, is not authorized to pass ordinances which contravene the express provisions and the clear implications of the statute under which the city is incorporated. The creation of a fire board is unauthorized and is impliedly forbidden by the statute; and the attempt by ordinance to invest such fire board with powers and duties which the statute imposed upon the common council, or upon the chief engineer of the fire department, and which could not be delegated, is a palpable violation of the statute, and, therefore, invalid and void. *Benjamin v. Webster*, 15

2. *Power over Streets.—Railroad Tracks.—Running of Trains.—Security of Citizens.—Non-Exercise of Legislative Power.—Liability for Personal Injury.*—Under section 3161, R. S. 1881, the common council of an incorporated city has exclusive power over the streets, highways and alleys within such city, and may grant a railroad company the right and privilege to lay down and use railroad tracks over, along or across such streets, highways or alleys. Under the *forty-second* clause of section 3106, R. S. 1881, such common council may provide, by ordinance, for the security of citizens and others from the running of trains through the city, and, to that end, may require such railroad company to provide and use suitable safeguards at the intersection of streets, highways or alleys, or elsewhere, within such city; but such city is not liable in damages for injuries to persons or property, which may result from the non-exercise of such legislative power by its common council.
Kistner v. City of Indianapolis, 210
3. *Street.—Sidewalks.*—The word "street" embraces sidewalks, and the statute requiring compensation for damages resulting from a change of grade applies to changes in the grade of a sidewalk.
City of Kokomo v. Mahan, 242
4. *Same.—Change of Grade.—Compensation for Damages.—Injunction.*—Where a change in the established grade of a street occasions serious injury to an adjoining property owner, he may maintain an injunction to restrain the municipal authorities from proceeding until the damages are assessed and tendered as provided by statute. *Ib.*
5. *Same.—Authority to Improve Streets.—Right to Collect Assessment for Cost of Second or Subsequent Improvement.*—The authority to improve streets is a continuing one, and the corporate authorities may make a second or subsequent improvement, and collect the expense thereof from the adjoining lot owners. *Ib.*
6. *Same.—Discretion of Corporate Authorities.—Injunction.*—The municipal authorities are invested with the power of determining when a second improvement is necessary, and the courts can not control this discretionary power by injunction. *Ib.*
7. *Same.—Change of Grade.—Character of Injury Resulting.—Injunction.*—An averment in a complaint, that "the plaintiff will sustain damages, occasioned by the change of grade, in the sum of \$—," is not sufficient to entitle the plaintiff to an injunction, because it does not show that the damages will be of a serious character. *Ib.*
8. *Same.—Constitutional Law.—Consequential Damages Resulting from Change of Grade.*—Consequential injuries resulting from a change in the grade of a street do not constitute a taking of private property for a public use within the meaning of the Constitution, and a property owner can only claim damages for such injuries in cases where the right to damages is given by statute. *Ib.*
9. *Municipal Corporation.—Annexation of Territory.—Estoppel of Land-Owner.*—A property-owner does not estop himself from contesting the validity of proceedings ordering the annexation of territory to the corporation in cases where there is no jurisdiction to make the order, by voting at municipal elections and by offering himself as a candidate for office; nor does he estop himself by unsuccessfully petitioning the common council to improve the streets.
Strosser v. City of Fort Wayne, 443
10. *Same.—Jurisdiction of Common Council in Annexation Proceedings.*—The common council of a city has no authority to order the annexation of contiguous territory unless it has been laid off into lots and platted, without the consent of the owners, and an order annexing territory not platted, and in cases where the owner has not consented, is void. *Ib.*

11. *Same.—Estoppel of Property-Owner.—Improvements by City.*—If the property-owner for a considerable length of time acquiesces in the annexation proceedings, and, without objection, sees the city make improvements and expend large sums of money upon the faith of the validity of the proceedings, he will be estopped from impeaching the validity of the proceedings, although he may not have directly received any benefit from the improvements made by the city. *Ib.*
12. *Same.—Corporate Boundary.—Ignorance of Facts.—Estoppel.*—Where public officers, having no personal interest in the matter, and, acting in good faith, assume to make a change in the corporate boundaries of a city, and fail through mistake of fact to proceed in accordance with the statute, a property-owner who resides in the territory sought to be annexed, and who sees the city spend large sums of money in making public improvements on the territory annexed, may be estopped even though he did not know that the proceedings were void. *Ib.*
13. *Municipal Corporation.—Establishing Street Grade.—Changing Grade.—Damages to Owners.*—Under section 3073, R. S. 1881, the grade of a street, which can not be changed without the assessment and tender of damages occasioned thereby, is a grade established in pursuance of some ordinance or order of the common council involving some general plan of improvement or grading of a street, or specified portion thereof. And such grade, when established, must be approved and adopted, in some way, by the common council, and should be made a matter of record. The record of the survey establishing the grade should appear in the record which the civil engineer is required to keep; and the proceedings of the council should, in some way, either by ordinance or resolution, show that the survey establishing the grade was authorized or approved so as to make it authoritative. Until proceedings are had by the common council, directing that the grade of a certain street, or streets, or specific portions thereof, shall be established, or that a grade already established is approved and adopted, in some authoritative way, by the common council, it can not be deemed that the "city authorities have once established" a grade of a street; and improvements are made by lot-owners subject to the right of the city to establish or change the grade without the assessment or payment of damages. *Mattingly v. City of Plymouth, 545*
14. *Same.—Estoppel as to Establishment of Grade.*—The fact that an ordinance requires all sidewalks to be built in conformity with the grade of the corresponding street, and makes it the duty of the street commissioners to oversee the construction and maintenance of all sidewalks, and requires all persons, before laying a sidewalk, to apply to the city engineer for the proper grade, and to construct the proposed sidewalk in accordance with the grade as given by him, and the fact that one who does so apply makes such improvement according to the direction of the engineer, where the street has not been established by the steps above specified and required by section 3073, R. S. 1881, do not estop the city from establishing a different grade for the street without the assessment and tender of damages. Nor does the fact that the committee on streets, with the city engineer, directed the owner where to place the sidewalk, estop the city. *Ib.*
15. *Same.—Inhabitants Compose Corporation.*—The inhabitants of the territory embraced within the corporate limits, and not the officers, constitute the corporation. *Baumgartner v. Hasty, 575*
16. *Constitutional Law.—Ordinances.*—The provisions of the Constitution respecting the titles of statutes do not apply to the ordinances of municipal corporations. *Ib.*
17. *Same.—Incorporation of Prior Ordinance by Reference.*—A prior ordinance

may be incorporated in a subsequent ordinance and carried forward by appropriate language. *Ib.*

18. *Municipal Corporation.—Negligence.—Streets.*—It is the duty of municipal corporations to keep all their streets in a reasonably safe condition for travel, so as not to endanger the persons and property of those lawfully using them, and they are liable for negligently suffering the streets to become unsafe. *City of Aurora v. Bitner, 396*
19. *Same.—Notice of Defect in Streets.—Time.*—A municipal corporation is liable for injuries caused by its neglect or omission to keep its streets in a safe condition for travel, as well as for those caused by defects occasioned by the wrongful acts of others, where the corporation has actual or constructive notice of the defect which caused the injury. Notice to the corporation of the unsafe condition of a street may be inferred from the length of time it has existed, as well as from other facts and circumstances. What is such a length of time must, in a great measure, depend on the circumstances of the particular case, and must, in most cases, be a question of fact to be submitted to the jury. *Ib.*
20. *Same.—Crossing Constructed by Private Person.*—A municipal corporation is not exempted from its liability for defects in a crossing by the mere fact that it was constructed by a private person. If such crossing is constructed in a public street, where the public pass on foot, and the same gets out of repair and becomes unsafe, and remains so for such a length of time that the proper authorities, in the exercise of reasonable care and prudence, ought to have discovered the defect and repaired it, the corporation is liable for the negligence, without actual notice. *Ib.*

COLLATERAL ATTACK.

See JUDGMENT, 7.

CONDITION.

See GUARANTY, 1; SALE.

CONSIDERATION.

See CONTRACT, 2, 4, 5; FRAUD, 3; LIFE INSURANCE, 9; MORTGAGE, 4; PARTNERSHIP, 6; PLEADING, 4; PRINCIPAL AND SURETY, 2; PROMISSORY NOTE, 1, 3; VENDOR AND PURCHASER; WATERCOURSE.

CONSOLIDATION.

See RAILROAD, 8 to 12.

CONSTITUTIONAL LAW.

See CITY, 8, 16; CRIMINAL LAW, 14; STATUTE.

CONTINUANCE.

See CRIMINAL LAW, 16.

Same.—Absence of Counsel.—Practice.—Counter affidavits are not allowed upon a motion for a continuance, and the absence of the principal counsel in a cause, suddenly called away on account of illness of a relative, very shortly before the call of the cause for trial, justifies a continuance in the discretion of the court. *Estlinger v. East, 434*

CONTRACT.

See ATTORNEY AND CLIENT, 1, 5; BAILMENT; COSTS, 2; EVIDENCE, 6; EXEMPTION; FAMILY SETTLEMENT; GUARANTY; GUARDIAN AND WARD; INSURANCE, 2, 3; LIFE INSURANCE; MECHANIC'S LIEN, 2; MORTGAGE, 2, 4, 7 to 9; PARTNERSHIP, 3, 4, 6; PLEADING, 4, 9, 10; PRINCIPAL AND AGENT, 3 to 5; PRINCIPAL AND SURETY, 1, 2, 5; PROMISSORY NOTE; RAILROAD, 5, 8 to 12.

1. *Infant.—Guardian and Ward.—Disaffirmance of Contract with Guardian.—Ratification.—Receipt.*—A ward may, after he becomes of age, disaffirm a contract which he made, while an infant, with his guardian, without restoring, or offering to restore, the property which he purchased and received under the contract; but where, after majority and without fraud or undue influence, such ward executes to his guardian a receipt for the value of the property received by him, such act is a valid ratification of the contract, even if such ward was ignorant of the fact that he had a right to disaffirm. *Fetrow v. Wiseman*, 40 Ind. 148, disapproved. *Clark v. VanCourt*, 113
2. *Promissory Notes.—Consideration.—Warranty of Machine, Breach of.—Notice.—Pleading.—Counter-Claim.*—In an action upon promissory notes given by the defendant in payment for a harvester and binder, he answered, setting up a warranty executed by the plaintiff's agent, whereby the machine was "warranted to be well made, of good material, and durable with care," and it was agreed that if, upon one day's trial, the machine would not work well, the purchaser should give immediate notice to the plaintiff, or its agent, and allow time to send a person to put it in order, and if it could not then be made to work well, the defendant should return it at once to the agent, and all cash and notes received in settlement would be refunded. It was alleged that the defendant, in the first harvest after he received the machine, tested it, and after vain attempts to make it run and cut, first with three horses and then with four, was compelled by its failure to work well to abandon his efforts; that its weight upon the necks of the horses was so great as to injure them; that it was defective in material and construction, and would not work at all; that he immediately gave notice to the plaintiff's agent, and said agent attempted to make said machine work, and failed; that defendant retained said machine at the solicitation of said agent, and on his agreement that plaintiff would so repair it by the next harvest that it would work as warranted, and, relying upon said agreement, paid one note, not in suit; that plaintiff had wholly failed and refused to repair said machine. Prayer for judgment for the amount of the note paid and for the cancellation of the notes in suit.
Held, that the answer was sufficient as a counter-claim.
Held, also, that the heavy draught and the weight upon the horses were breaches of the warranty, and the defendant was not bound to show what defect in the construction of the machine caused these results.
Held, also, that the facts, that there was an original defect in the construction of the machine, and that the plaintiff, upon notice, attempted to remedy it and failed, gave the defendant a right of action upon the warranty, notwithstanding the stipulation for notice upon one day's trial. *McCormick, etc., Co. v. Gray*, 285
3. *Correspondence.—Evidence.*—A contract need not be embraced in a single writing, but may be contained in letters constituting a correspondence between the parties, and such letters are admissible for the purpose of proving the contract and its terms and conditions. *Thames L. & T. Co. v. Beville*, 309
4. *Consideration.—Restraint of Trade.—Damages.—Parties.—Pleading.*—G. & G., as partners, owned and operated a livery stable in the town of R., as did H. and also J. Bros. The last named sold for merely the value thereof the personal property used in the business, a part to G. & G. and the remainder to H., but did not sell or lease the stable, and, in consideration of the purchase, made a written contract with them agreeing not to engage in the business in the stable of J. Bros., nor permit others to do so for a period of five years, and that \$2,500 should be paid as liquidated damages for breach of the contract. There was a breach by act of one of the sellers; but H., having quit the business,

refused to join G. & G. as plaintiffs, and therefore they made him a defendant.

Held, that the written contract was upon sufficient consideration, and was valid.

Held, also, that it was unnecessary to allege special damages, the sum fixed by the contract being liquidated damages, and not a penalty.

Held, also, that H., having refused to join as plaintiff, was properly made a defendant under section 269, R. S. 1881.

Held, also, that G. & G. could sue alone and recover the whole liquidated damages.

Held, also, that both defendants were liable for a breach of the contract by the act of one. *Johnson v. Gwinn, 466*

5. *Statute of Frauds.—Parol Contract.—Personalty.—Consideration.*—A parol contract for the purchase of five thousand bushels of corn, at fifty cents per bushel, payable on delivery, the purchaser as a part consideration of the sale to furnish bags in which to put the corn when shelled, which he does to the value of \$100, is within the statute of frauds and cannot be enforced. *Hudnut v. Weir, 501*

6. *Same.—Earnest.—Part Payment.*—In such case the delivery of the bags is not "earnest or part payment." *Id.*

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 11, 17, 20, 21.

CONVEYANCE.

See MARRIED WOMAN.

COSTS.

See EXEMPTION.

1. *How Reversal of Judgment Controls Liability.—Interlocutory Order.*—Where, upon appeal from an interlocutory order appointing a receiver, the order is reversed because a motion for change of judge had before been overruled, and the cause remanded with directions to grant the change, the appellant recovers costs below accruing after the refusal of the change until the order appointing the receiver, but not those accruing after such appointment. *Shoemaker v. Smith, 40*

2. *Recoupment.—Counter-Claim.*—Suit in the circuit court on a contract for the purchase of a machine by the defendant. Answer, that the plaintiff failed so to adjust the machine as agreed, whereby the defendant suffered loss, etc. The plaintiff recovered less than \$50.

Held, that the answer, though not a counter-claim in form, was such in fact, within the meaning of section 591, R. S. 1881, and as it might be presumed that the claim was reduced below \$50 by reason thereof, the plaintiff could recover costs. *Fuller v. Curtis, 237*

3. *Postponement of Trial.—Judgment.*—A preliminary judgment against defendants on a motion to postpone trial to a day in term, for all the costs of the term, is erroneous. It should be only for the costs caused by the delay. *Holsman v. Hibben, 338*

COUNTER-CLAIM.

See CONTRACT, 2; COSTS, 2; PLEADING, 9, 13, 14, 17; REAL ESTATE, ACTION TO RECOVER, 2.

COUNTY COMMISSIONERS.

See DRAINAGE, 14; HIGHWAY, 3; RAILROAD, 3; STATUTE, 2; TRESPASS.

COUNTY SURVEYOR.

See SURVEY.

COUNTY TREASURER.

See GUARDIAN AND WARD; TAXES, 2.

CRIMINAL LAW.

See INTOXICATING LIQUOR, 2, 3.

1. *Gaming.—Indictment.—Duplicity.—Motion to Quash.*—An indictment under section 2079, R. S. 1881, charged that one D., on, etc., "was the keeper, manager and tenant occupying a certain building, * * and did then and there * * unlawfully and knowingly permit and suffer" certain persons "to be and remain, playing and gaming therein at the unlawful games of faro and poker, * * for money, * * and did then and there, on," etc., "unlawfully keep said building to be used and occupied for gaming, contrary," etc. On motion to quash, *Held*, that the indictment is not bad for duplicity. *Davis v. State, 154*
2. *Same.*—In such case, where the offences charged were committed by the same person, at the same time, and as a part of the same transaction, and subject the offender to the same punishment, they may be joined conjunctively in one count as one offence. *Ib.*
3. *Murder.—Manslaughter.—Indictment.*—Under an indictment charging murder in the first degree, there may be a conviction for manslaughter if the evidence warrant it. *Barnett v. State, 171*
4. *Same.—Self-Defence.*—Life may be taken in the reasonable and lawful exercise of the right of self-defence. This right must be exercised honestly; a party can not provoke an assault in order that he may have an apparent excuse for the homicide. *Ib.*
5. *Same.—Instructions.*—An instruction, unobjectionable as far as it goes, will not be condemned, as an available error. If, in such case, a party wishes further instructions, he must ask for them. *Ib.*
6. *Same.*—A party will not be heard to complain of an instruction as erroneous which is more favorable to him than he has a right to ask. *Ib.*
7. *Same.—Province of Jury.*—An instruction to the jury, that they are the judges of the law, that the court's instructions are not to bind their consciences, but merely to aid and assist them in a true apprehension of the law, and its proper application to the evidence, is not erroneous. *Ib.*
8. *Same.—Harmless Error.*—The refusal of instructions, the substance of which is embodied in charges given, is not an available error. *Ib.*
9. *Misconduct of Jury.—Separation without Leave.—Supreme Court.*—Under section 1842, R. S. 1881, the misconduct of a jury in separating without leave of the court, after retiring to deliberate on their verdict, is the second statutory cause for a new trial in criminal cases; but where a new trial is refused for this cause, and it appears that the jury had leave of the court to separate after they had agreed upon their verdict, and that they had agreed upon their verdict and reduced it to writing, and sealed up the same before they separated, and that such verdict was complete in every respect, except that it was not signed by the foreman of the jury, then it is the duty of the Supreme Court, under section 1891, R. S. 1881, to disregard the supposed error of the court below in overruling the motion for a new trial for this cause, when, in the opinion of the Supreme Court, the error, if any, is purely technical and does not prejudice the substantial rights of the defendant. *Clayton v. State, 201*
10. *Same.—Swearing Bailiff.—Misconduct of Jury.—Bailiff's Presence in Jury Room.—Trial.—Weight of Evidence.—Supreme Court.*—It is sufficient if the jury trying a criminal cause are placed in charge of a bailiff, who has been sworn to act as such bailiff for the term. Ordinarily, the bailiff's presence in the jury-room, during the deliberations of the jury

on their verdict, is such misconduct of the jury as will constitute sufficient cause for a new trial; but where the question of such misconduct is tried below upon affidavits and counter-affidavits, and the court decides in effect that the defendant was not injured or harmed thereby, the Supreme Court will not disturb such decision on the weight of the evidence. *Ib.*

11. *Same.—Evidence.—Supreme Court.*—In criminal as in civil causes, unless there is an absolute failure of evidence on some material point, the Supreme Court will not reverse the judgment on the evidence. *Ib.*
12. *Arson.—Affidavit.—Description of Property Burned.*—Where an affidavit, charging arson, describes the property destroyed as "a certain frame building, commonly called a stable," it sufficiently indicates the purpose for which such building is, or is intended to be, used.

Dugle v. State, 259

13. *Same.—Juror, Competency of.—Opinion as to Guilt or Innocence of Accused.—Statute Construed.*—Under the second clause of section 1793, R. S. 1881, when a person, called as a juror in a criminal trial, has either formed or expressed an opinion as to the guilt or innocence of the defendant upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay merely, he may nevertheless, in the discretion of the court, be admitted to serve, provided the court is satisfied that he is able, notwithstanding such opinion, to render an impartial verdict in the cause; but where such opinion is based upon conversations with witnesses to the alleged offence, or reading reports of the testimony of such witnesses or hearing them testify, such person is absolutely incompetent to serve as a juror in such cause, if objection is made at the proper time. *Ib.*

14. *Constitutional Law.—Impartial Jury.—Causes of Challenge.*—The question, what is an impartial juror, is largely a judicial question, in view of the Constitution which in a criminal case guarantees to the defendant a trial by an impartial jury, and hence section 1793, R. S. 1881, so far as it enumerates causes of challenge, excluding all others, is not necessarily conclusive upon the courts. *Block v. State, 357*

15. *Same.—Challenge of Juror.—Deputy Prosecuting Attorney not Competent Juror.—New Trial.*—A deputy of the prosecuting attorney, though not a lawyer, is not a competent juror in a criminal cause, and may be challenged; and if the fact be not discovered until after verdict, a new trial should be granted, though he make oath that he was not influenced thereby. *Ib.*

16. *Plea of Guilty.—Suspension of Sentence.—Subsequent Arrest.—Motion for Discharge.—Error.*—Where an adult defendant, charged by indictment with felony, enters a plea of guilty, and an order-book entry in the cause, after showing the finding of the court as to the amount and character of his punishment, concludes thus: "And the court now suspends the sentence herein, and cause continued for *alias* process," upon his subsequent arrest, there is no error in overruling a motion for his discharge, based upon the assumption that such order-book entry was the final judgment of the court in the cause. *Shaffer v. State, 365*

17. *Same.—False Pretences.—Question of Fact.—Indictment.*—Where the indictment charges the defendant with having obtained money by certain false pretences, whether or not the alleged false pretences are such as would deceive, is a question of fact, and not of law. *Ib.*

18. *Murder.—Admission to Bail.—Habeas Corpus.—Supreme Court.—Practice.*—In a proceeding by habeas corpus by a party indicted for murder to be admitted to bail, the Supreme Court, upon appeal by the petitioner, will examine and pass upon the evidence.

Ex Parte Kendall, 599

19. *Same.—Indictment.—Burden of Proof.*—An indictment for murder implies *prima facie* that the accused has no right to bail, and the burden is upon him to show that the proof of his guilt is not evident, and that the presumption of his guilt is not strong. *1b.*

CURATIVE STATUTE.

See STATUTES.

CUSTOM.

See PRINCIPAL AND AGENT, 6.

DAMAGES.

See ATTORNEY AND CLIENT, 2; BAILMENT; CITY, 2, 3, 4, 7, 8, 13, 14, 18 to 20; CONTRACT, 2, 4; GUARANTY, 1; NEGLIGENCE; PLEADING, 9; RAILROAD, 1, 2, 13, 16, 18 to 21; SUPREME COURT, 13.

DECEDENTS' ESTATES.

See DESCENTS; FAMILY SETTLEMENT, 2, 3; LIFE INSURANCE, 8, 9; PARTNERSHIP, 5, 7; REVIEW OF JUDGMENT.

1. *When Heirs may Collect Debts.*—Where there is no administration, and there are no debts to pay, the heirs may collect the debts payable to their deceased ancestor. *Holzman v. Hibben, 338*

2. *Heir.—Administrator.—Rents of Land.*—Rents which accrue prior to the death of the intestate belong to the administrator, and form part of the assets of the decedent's estate, but unless land is required for the payment of debts, such rents go to the heir together with the rents which accrue subsequent to the death of the ancestor.

Humphries v. Davis, 369

3. *Same.—Right of Administrator to Recover Personal Property.*—E. D. was the adoptive daughter of I. D. and J. D., his wife; the latter died, and subsequently the adoptive daughter died; the adoptive father took possession of the personal property left by his wife, and the administrator of the adoptive daughter's estate sued to recover the property, but did not show that there was not an administration on the estate of J. D., nor that she did not owe debts.

Held, that the action can not be maintained. *1b.*

4. *Gift.—Assets.—Widow.—Heirs.—Distribution.—Agreed Case.*—In an agreed statement of facts, it was made to appear that D., in his lifetime, before he married the plaintiff, his second wife, donated and gave to a school association, to aid in establishing the same, a certain sum of money. After D.'s death and the final settlement of his estate, the trustees of such association sold its property and out of the proceeds paid said sum to the defendant, as the only child and heir of D. by a former marriage. D. had no children by said second wife. Upon these facts the court was asked to determine the rights of the parties.

Held, that as the facts show an absolute gift to the association by D., its payment of the money to the defendant was voluntary merely, and such money can not be treated as assets of D.'s estate, or as property belonging to him, and that such defendant can not be required to make distribution of it among the heirs. *Day v. Day, 460*

DEED.

See MARRIED WOMAN; TAXES, 2.

DELAY.

See ACTION; CHANGE OF VENUE; TOWNSHIP TRUSTEE, 3.

DEMURRER TO EVIDENCE.

See LIFE INSURANCE, 11.

1. *Effect of*.—A demurrer to evidence concedes the truth of all the facts which the evidence demurred to tends to prove, and all such inferences as can reasonably be drawn therefrom, and if there is evidence favorable to the party demurring, the court can not consider it when it is in conflict with that against him.

McLean v. Equitable L. Assurance Society, 127

2. *Same*.—*Waiver*.—Such demurrer waives objection to the admissibility of the evidence to which it is directed, and excludes from consideration that offered by the party demurring. *Ib.*
3. *Same*.—*Objections to Pleadings*.—Such demurrer can not be sustained because of any defect in the pleadings, but it does not waive objections thereto. *Ib.*
4. *Same*.—If, from the evidence, a jury might infer that the plaintiff's action should be sustained, the defendant's demurrer should be overruled and the plaintiff have judgment. *Ib.*

DEPUTY.

See CRIMINAL LAW, 15.

DESCENTS.

See WILLS, 2.

1. *Illegitimate Child*.—*Inheritance from Mother*.—Under section 2474, an illegitimate child, if its mother be dead, takes by inheritance from her any property or estate which she would, if living, have taken by gift, devise or descent from any other person. *Parks v. Kimes, 148*
2. *Adoptive Child*.—*Adoptive Parents*.—Where a child, adopted by a husband and his wife jointly, dies, without children or their descendants, the owner of land inherited from the adoptive mother, the surviving husband and adoptive father inherits such land, and it does not descend to the natural mother. *Humphries v. Davis, 274*
3. *Same*.—*Status*.—The rights of descent flow from the legal status of the parties, and where the status is fixed the law supplies the rules of descent. *Ib.*
4. *Same*.—*Statutes*.—*Construction of*.—A statute introducing a new right, or creating a new status, is not to be construed as a separate and independent law, but is to be considered as forming part of one uniform system, and, in giving it effect, it is proper for the courts to look to other statutes, to the common law, to the principles of natural justice, to the source from which the new right was derived, and to the object intended to be accomplished by the Legislature. *Ib.*
5. *Adoptive Child*.—*Adoptive Parents*.—Where a child is adopted by a husband and his wife jointly, and dies, without children or their descendants, the owner of land inherited from the adoptive mother, the surviving husband and adoptive father will take such land in preference to the natural mother. *Humphries v. Davis, 369*
6. *Same*.—Where a husband and wife jointly adopt a child, and the child so adopted dies, without children or their descendants, the owner of land inherited from the adoptive mother, the surviving husband and adoptive father will inherit such land, in preference to the natural mother. *Paul v. Davis, 428*

DEVISE.

See DESCENTS, 1; WILLS.

DILIGENCE.

See ACTION; NEW TRIAL, 12; REVIEW OF JUDGMENT.

DISCRETION.

See CITY, 6; CRIMINAL LAW, 13; CONTINUANCE; EVIDENCE, 1; PRACTICE, 7.

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DONATION.

See RAILROAD, 3.

DOWER.

See WILLS, 1, 2.

DRAINAGE.

1. *Remonstrance.—Report of Commissioners.*—In a remonstrance to the report of the drainage commissioners, under the statute, R. S. 1881, section 4273, *et seq.*, as amended, Acts 1883, p. 173, it is not sufficient to state that the report is not according to law. The particulars in which it is claimed the report is not according to law must be stated.
Meranda v. Spurlin, 380
2. *Same.—Cause of Remonstrance.—Uncertainty.*—A cause of remonstrance, that the report of the commissioners does not show with sufficient certainty the method of drainage, is too uncertain. *Ib.*
3. *Same.—Conclusiveness of Report of Commissioners.*—As to whether or not the method of drainage adopted is the cheapest and most practicable, are questions for the judgment of the commissioners, and in the absence of fraud, their judgment thereon can not be reviewed. *Ib.*
4. *Same.—Presumption.*—The decision of the commissioners upon these questions need not be embodied in their report. From the location of the drain by the commissioners it will be presumed that they passed upon these questions. *Ib.*
5. *Same.—Report as to Location of Drain.*—As to the location of the drain, the courses and distances are all that need be stated in the report of the commissioners. *Ib.*
6. *Same.—Sufficiency of Report.*—A report of the commissioners in substantial compliance with the form prescribed by the statute is sufficient. *Ib.*
7. *Same.—Amendment.*—The court may allow the commissioners to amend their report after it has been filed. *Ib.*
8. *Same.—Evidence.*—The evidence in support of the remonstrance will be confined to the issues tendered by it. *Ib.*
9. *Same.—Witnesses' Opinions.*—The opinions of witnesses, that the drain will be of public utility, benefit any highway, or benefit or damage any particular lands, are not competent evidence. *Ib.*
10. *Same.—Available Error.*—A party who first introduced such evidence upon such questions can not successfully ask a reversal of the judgment because the other side is allowed to meet it with like evidence upon the same questions. *Ib.*
11. *Same.—Evidence.—Motion for New Trial.*—Questions as to the sufficiency of the evidence, and the admission and exclusion of testimony, in a proceeding to establish a drain, are properly presented by a motion for a new trial. *Ib.*
12. *Same.—Public Utility, Proof of.*—The question of public utility is not to be split up, and the drain defeated, by showing that it will not be of public utility in one of the counties into which it extends. The question of public utility has reference to the drain as a whole, without regard to the county lines that may cross it. *Ib.*
13. *Same.—Drains Extending into More than one County.—Authority to Establish.*—The circuit court in which the petitioner resides, and in which the proceeding is commenced, has authority to establish a drain extending into another county. *Ib.*
14. *Same.—Establishing Such Drain upon Line of Drain Formerly Established by Board of County Commissioners.*—Such drain, under the above acts, may be established and constructed along and upon a drain formerly

constructed by the order and judgment of the board of county commissioners. *Ib.*

15. *Same.—Proof of Notice.—Nunc Pro Tunc Entry.*—From the affidavits on file in proof of posting the notices, and the court's notes, "proof of notice filed, cause ordered docketed," a *nunc pro tunc* entry may be made at a subsequent term showing that the notices were posted, as stated in the affidavits. *Ib.*
16. *Same.—Notice of Entry.*—A party, having appeared to a motion for a *nunc pro tunc* entry, can not afterwards object that notice of such motion was not served upon others, against whom benefits are assessed. *Ib.*
17. *Same.—Sufficient Proof of Notice.*—Under the statute as amended, Acts 1883, p. 174, proof of the posting of notices need not necessarily be by affidavit. *Ib.*
18. *Complaint for Assessments.—Exhibits.*—In a suit by a commissioner of drainage to collect an assessment of benefits, a copy of the assessment should be made a part of the complaint; otherwise it will be bad, and a bad answer sufficient for it. *State, ex rel., v. Myers, 487*
19. *Same.—Answer.*—To a good complaint in such case, an answer is bad which shows that the original petition for drainage was defective. *Ib.*

DUPLICITY.

See CRIMINAL LAW, 1, 2.

ELECTION.

See TOWNSHIP TRUSTEE.

EMINENT DOMAIN.

See CITY, 8.

EQUITY.

See BANK CHECK, 2; FAMILY SETTLEMENT; RAILROAD, 10, 11.

ESTOPPEL.

See CITY, 9, 11, 12, 14; JUDGMENT; MARRIED WOMAN, 1, 2, 4; RAILROAD, 10; WATERCOURSE, 2.

EVIDENCE.

See ACTION; BAILMENT, 1; CONTRACT, 3; DEMURRER TO EVIDENCE; DRAINAGE, 8 to 11; INTOXICATING LIQUOR, 1, 3; INSTRUCTIONS TO JURY, 1, 3, 5, 7; JUDGMENT, 1 to 3, 6; LIFE INSURANCE, 5 to 7, 11; MALICIOUS PROSECUTION, 2 to 5; MASTER COMMISSIONER; NEGLIGENCE, 13; NEW TRIAL, 3 to 12; PRACTICE, 2, 7 to 9, 14 to 17; PRINCIPAL AND AGENT, 1, 3, 4; PRINCIPAL AND SURETY, 4, 5; RAILROAD, 2, 18 to 20; SUPREME COURT, 5, 6, 8 to 12, 15; SURVEY.

1. *Witness.—Expert.—Time.—Remoteness.—Discretion of Court.*—Where B. is called as a witness by the defendant to impeach the competency of F., a witness for plaintiff, in a particular employment, and it is proposed to prove by B. that three or four years previously F. had been in his service, and that he was neither an expert nor a competent person for such particular employment, the trial court may exclude such testimony as too remote, as in such cases the remoteness or proximity of the time rests very much in the discretion of the *nisi prius* court.

Adams v. Sullivan, 8

2. *Same.—Proof of Reputation.—Particular Employment.*—Proof of reputation is not admissible to show what a party's relations are to a limited number of persons, or what his qualifications may be for some merely private pursuit, or whether he is skilled in some particular employment. *Ib.*

3. *Witness.—Opinion.*—The opinion of a mortgagor of chattels as to the value thereof may be shown by proof of the fact that he offered the same goods absolutely in payment of the mortgage debt.
Curme, Dunn & Co. v. Rauh, 247
4. *Witness.—Comparison with Standards not Admitted.*—It is improper to permit a witness to base a conclusion as to the character of a machine, as to draught and manner of doing work, by comparison with other machines that the witness has seen, and which are not admitted to be true standards of excellence.
McCormick, etc., Co. v. Gray, 285
5. *Principal and Agent.—Statements of Agent.*—Where an agent's authority is not general, but special only, the statements of such agent as to any matter outside the scope of his agency will not bind the principal.
Baker v. Carr, 330
6. *Implied Contract.—Work and Labor.*—Upon the trial of a claim by a daughter-in-law, against the estate of her father-in-law, upon an implied contract for care and nursing during his last sickness, evidence tending to show that she and her husband lived with the deceased in his house as a common family, he hiring domestics, furnishing supplies, and the like, is admissible.
Johnson v. Johnson, 389
7. *Town Plat.—Explanatory Note.—Location.*—An explanatory note upon a town plat, which is inconsistent with all other things which appear by the plat, including courses and distances marked thereon, will not be held to control the other facts thus appearing when a question of the location of a lot is in dispute.
Hunter v. Eichel, 463

EXCESSIVE DAMAGES.

See NEGLIGENCE, 10; SUPREME COURT, 13.

EXECUTION.

See EXEMPTION.

EXECUTOR.

See LIFE INSURANCE, 8, 9.

EXEMPTION.

Debt upon Contract.—Costs.—Under section 703, R. S. 1881, a resident householder can claim an exemption of his property from sale on execution, or other final process from a court, only where such execution or other process is for a debt growing out of or founded upon a contract, express or implied. Costs are not a matter of contract, but they are given or withheld by statute; and where an execution is issued upon a judgment for costs, and it does not appear that such costs were even incident to any debt founded upon any contract, express or implied, the execution defendant, though a resident householder, can not claim any of his property as exempt from sale on such execution.

State, ex rel., v. McIntosh, 439

EXHIBITS.

See DRAINAGE, 18; INSURANCE, 1; LIFE INSURANCE, 1, 10; PLEADING, 7, 16.

EXPERT.

See EVIDENCE, 1; RAILROAD, 20.

FALSE PRETENCES.

See CRIMINAL LAW, 17.

FAMILY SETTLEMENT.

1. *Contract.—Rescission.—Equity.—Pleading.—Complaint.—Demurrer.*—In equity, the court may require a plaintiff to do equity, as a condition upon which it will grant relief, and a failure to show in the complaint to rescind a contract, that the plaintiff has offered to do equity before

suit brought, if the complaint offer to submit to the order of the court in that respect, does not necessarily render it bad on demurrer.

Shuee v. Shuee, 477

2. *Same*.—Complaint by a widow to set aside a family settlement, by which she had accepted payment of a sum greatly less than she was by law entitled to, in full of her share of her deceased husband's estate. The complaint offered to submit to such terms as the court would decree, but did not aver an offer to rescind or repay before suit brought. *Held*, that it was sufficient on demurrer. *Ib.*

3. *Same*.—*Fraud*.—A husband, seventy years of age, died intestate, owing no debts, with an estate, exclusively personal, of \$21,529, a childless widow and three children by a former marriage surviving. While living, he had given to his children all his real estate and \$6,000 in cash, and at the same time \$9,000 to the wife, for which she had executed a receipt to him as for "my share of division in the estate." At the marriage she had nothing. He had accumulated his estate, was sixty years old and eight years her senior. After his death, it being rumored that she claimed a further share, there was a meeting of the heirs and herself, attended also by a reputable and intelligent neighbor, who was a mutual friend, of kin to all the parties and had their confidence, whose presence the heirs had requested in the belief that he might be able to promote an amicable adjustment. All parties knew the facts, and the widow was a woman of ordinary mind, intelligence and business experience, but in infirm health temporarily. The only statement by the neighbor to her, subject to question, was that the \$9,000, which she had received, would be charged to her in the final settlement. She named the sum of \$2,000 as satisfactory; her proposition was accepted, the money paid, and she executed an assignment to the heirs of all her interest in the estate.

Held, that there was no fraud, actual or constructive, and no ground for annulling the settlement. *Ib.*

FENCE.

See RAILROAD, 4 to 7; TRESPASS.

FIRE BOARD.

See CITY, 1.

FIRE LIMITS.

See NUISANCE, 2.

FORECLOSURE.

See MECHANIC'S LIEN; MORTGAGE.

FORFEITURE.

See NUISANCE, 5; RAILROAD, 12; TOWNSHIP TRUSTEE, 3.

FORMER ADJUDICATION.

See JUDGMENT, 5, 6, 7; PLEADING, 17.

FRAUD.

See FAMILY SETTLEMENT, 3; LIFE INSURANCE, 8, 9; PRINCIPAL AND AGENT, 2.

1. *Chattels*.—*Bona fide Purchaser*.—A purchaser of chattels for value without notice, who buys from one who bought with intent not to pay, takes a good title against the original seller. *Aliter*, if he had notice of the intended fraud. *Curme, Dunn & Co. v. Rauh*, 247
2. *Same*.—*Evidence*.—In replevin by the seller against a mortgagee of the buyer, based on the theory that the buyer did not, when he purchased, intend to pay, the plaintiff introduced as evidence tending to

show the buyer's insolvency a balance sheet made by the buyer, showing the state of his business, also his list for taxation, both made shortly before the purchase.

Held, that these were admissible.

Held, also, that the belief of the defendant when he took his mortgage, that the mortgagor was solvent, was immaterial and incompetent as evidence in his behalf. *Id.*

3. *Bona Fide Purchaser.—Chattel Mortgage.*—A mortgagee of chattels which had been purchased by the mortgagor with intent not to pay for them, who takes his mortgage without notice to secure a pre-existing debt, without any new consideration, can not hold them against the seller, because he is not a *bona fide* purchaser. *Id.*

GAMING.

See CRIMINAL LAW, 1, 2.

GIFT.

See DECEDENTS' ESTATES, 4; DESCENTS, 1; MARRIED WOMAN, 1.

GUARANTY.

1. *Notice.—Lease.—Pleading.*—A guaranty, written upon a lease and delivered with it, which recites that in consideration of the making of the lease and agreement that security should be given for the performance of the agreements contained therein on the part of the lessee, "I hereby undertake and agree to and with" the lessors, that the lessee "will do and perform all his agreements in said lease by him to be done and performed," signed by the lessee and the guarantor, is one of strict guaranty, and, as such, makes it the duty of the guarantee to give notice to the guarantor of the default of his principal; but the giving of such notice is not a condition precedent to the guarantee's right to maintain an action against the guarantor, and the complaint, to withstand a demurrer, need not aver notice, nor does the failure to give notice discharge the guarantor from liability except to the extent of damages he may suffer thereby, and this must be set up in defence. *Ward v. Wilson, 52*
2. *Same.—Matter of Defence.*—If the failure of the lessors to be present at the end of the lessee's term to accept the surrender of possession is available to the guarantor at all, it can only be made so by answering that fact, coupling it with such other facts as would show injury to him; so also, if the guarantor is injured by the subsequent conduct of the lessors in prosecuting suits against the lessee, or by accepting payment of damages, such facts are matters of defence. *Id.*

GUARDIAN AND WARD.

See CONTRACT, 1; RAILROAD, 17; WILLS, 4.

Personal Liability of Guardian.—Taxes.—County Treasurer.—Contract.—Statute of Frauds.—A guardian, E., whose ward's land was advertised for sale for taxes, requested S., the treasurer, to receipt such taxes as paid and hold the receipt for a short time, when he would get money from a sale of the land and pay the same. S. thereupon did as requested, and in his settlement with the auditor accounted for such taxes as paid. E. sold the land and settled with his ward without paying S. *Held*, that E.'s promise is not within the statute of frauds, and that he is personally liable to S. for the amount of such taxes. *Elson v. Spraker, 374*

HABEAS CORPUS.

See CRIMINAL LAW, 18.

HARMLESS ERROR.

See CRIMINAL LAW, 8; LIFE INSURANCE, 11; PRACTICE, 15, 17;
SUPREME COURT, 3, 11.

HEARSAY.

See CRIMINAL LAW, 13; LIFE INSURANCE, 6.

HEIRS.

See DECEDENTS' ESTATES; DESCENTS.

HIGHWAY.

1. *Location.—Petition.—Jurisdictional Fact.—Appeal.—Practice.*—In a proceeding for the location of a public highway, the fact whether the petition was signed by twelve freeholders, six of whom resided in the immediate neighborhood of the proposed highway, is jurisdictional, and the finding of the board of commissioners on that subject is conclusive. Objection to the petition for such reason can only be made before the board, before viewers are appointed, and it can not be made in the circuit court on appeal. *Forsythe v. Kreuter, 27*
2. *Petition.—Words and Phrases.—Vacation.*—A petition for the vacation of a highway and the establishment of a new one, which states that "the same will affect lands owned by S. and T., as we believe said route will be of public utility," and that the vacation will "affect land owned by T. only," sufficiently complies with the statute requiring the names of the owners to be stated, and is sufficient. *Thayer v. Burger, 262*
3. *Same.—Appeal.—Practice.*—Objections in such case to the sufficiency of the petition or to the report of viewers, if not made before the county commissioners, are waived. *Id.*

HOUSEHOLDER.

See EXEMPTION.

HUSBAND AND WIFE.

See FAMILY SETTLEMENT, 3; MARRIED WOMAN; VENDOR AND PURCHASER, 2.

INDICTMENT.

See CRIMINAL LAW, 1 to 3, 16, 17, 19.

INFANT.

See CONTRACT, 1; NEGLIGENCE, 21.

INJUNCTION.

See CITY, 4, 6, 7, 13; JUDGMENT, 4; RAILROAD, 3.

1. *City.—Streets.*—Where a city is about to take land for a street wrongfully, under color of right, without assessment and tender of compensation, the owner may have injunction: *City of New Albany v. White, 206*
2. *Judgment.—Right of Land-Owner to Enjoin Sale of Land on Judgment against Another.*—A land-owner may maintain an injunction to prevent the sale of his land upon a judgment rendered against another person. *Petry v. Ambroscher, 510*

INSOLVENCY.

See BANK CHECK, 2.

INSTRUCTIONS TO JURY.

See BAILMENT, 2; BILL OF EXCEPTIONS; CRIMINAL LAW, 5 to 8; MALICIOUS PROSECUTION, 1, 2, 5; NEW TRIAL, 1; PRACTICE, 6, 13; RAILROAD, 19; SUPREME COURT, 5, 14.

1. *Evidence.—Court not to Determine Probative Force.*—It is not for the court, in ruling upon evidence, or in framing instructions, to determine the probative force of evidence. If it is material, relevant and competent, it is for the jury, and instructions bearing upon it, without respect to its weight or credibility, can not be deemed irrelevant.
Union Mut. L. Ins. Co. v. Buchanan, 65
2. *How Considered.*—Instructions are not to be considered in separate and detached parcels, but must be taken as a whole, and if, when so considered, they express the law without material contradiction, there is no error.
Ib.
3. *Same.—Evidence to Which Applicable.*—Where there is evidence to which an instruction is applicable, it is immaterial by whom or for what purpose it was introduced.
Ib.
4. *Same.—Repetition of.*—Where a proposition of law is once fully and clearly stated to the jury, it need not, and ought not to, be repeated in subsequent instructions.
Ib.
5. *Same.—Inferences.—Province of Jury.*—It is not proper for the court to instruct the jury as to mere inferences of fact which it is their duty to make from the evidence.
Ib.
6. *Hypothetical Case.*—Instructions which profess to fully state the law upon a particular subject, but which omit some material fact, essential to the validity of the hypothesis, may be properly refused.
Pennsylvania Co. v. Weddle, 138
7. *Admissions.*—The trial court instructed the jury, that evidence of verbal admissions made some time ago are subject to imperfection and mistake, and should be cautiously received, because the party may not have expressed his own meaning, or may have been misunderstood, and the witness may not give the exact language, and thereby change the meaning; but admissions deliberately made against interest, and well understood, are entitled to consideration; nevertheless the jury are the exclusive judges of the weight of the evidence.
Held, that this was error. Shorb v. Kinzie, 429

INSURANCE.

See LIFE INSURANCE.

1. *Pleading.—Complaint.—Exhibits.*—A complaint upon a policy of insurance to recover for a loss by fire, which does not exhibit the policy, or a copy of it, is bad on demurrer.
Indiana Ins. Co. v. Hartwell, 566
2. *Same.—Agency.—Cancellation of Policy.—Notice.*—An agent, with authority to obtain insurance, is not necessarily an agent of the insured, to whom notice of cancellation of the policy may be given, or payment of the unearned premium made, so as to bind the insured; nor is a recital in the policy, that the broker obtaining the insurance was agent of the insured, conclusive upon that subject.
Ib.
3. *Same.—Refunding Unearned Premium.*—In such case a direction to the agent to charge the unearned premium to the insurance company, he being personally indebted to the latter in a larger sum, is not a compliance with a stipulation in the policy that it may be cancelled by refunding the unearned premium.
Ib.

INTEREST.

See TAXES, 1.

INTERROGATORIES TO JURY.

See PRACTICE, 4 to 6; VERDICT, 1.

1. *Answers to Interrogatories.*—*Judgment Notwithstanding General Verdict.*—A judgment upon answers to interrogatories, notwithstanding the general verdict, will be rendered only when they show a fact or facts inconsistent therewith.
McCormick, etc., Co. v. Gray, 286

2. *Same.—Re-Submitting Interrogatories.*—The trial court may refuse, without error, to re-submit interrogatories to the jury for additional answers, when any fuller responsive answers which they might return could not control the general verdict. *Ib.*

INTOXICATING LIQUOR.

1. *Liquor License.—Evidence.*—Upon an application for license to sell liquors, evidence showing the location of the proposed place of business, with reference to the court-house, a college and public school, and that it is on a street necessarily much used by school children, is admissible. *Estinger v. East, 434*
2. *Judicial Knowledge.—Blackberry Brandy.*—Courts take judicial notice that brandy is an intoxicating liquor, and the addition of the word "blackberry" to the word "brandy" merely designates a particular kind of brandy. *Fenton v. State, 598*
3. *Same.—Sale on Sunday.—Evidence.—Presumption.*—Evidence that blackberry brandy was sold is sufficient to sustain a conviction for selling intoxicating liquor on Sunday, as the presumption is that the basis of the liquor was brandy. *Ib.*

JUDGE.

Special.—Appointment of.—Where the order appointing an attorney as special judge, upon an application for change of judge, recites that it is deemed difficult to procure a judge of another court without unreasonable delay, there is no room to question the appointment on the ground that no effort was made to procure another judge. *Chissom v. Barbour, 1*

JUDGMENT.

- See CRIMINAL LAW, 16; COSTS; INJUNCTION, 2; INTERROGATORIES TO JURY, 1; MORTGAGE, 8, 10; PLEADING, 16, 17; PRINCIPAL AND SURETY, 1 to 3; REVIEW OF JUDGMENT; STARE DECISIS; SUPREME COURT, 2, 3, 7, 10, 11; VENDOR AND PURCHASER, 1; VERDICT, 1.
1. *Nunc pro Tunc Entry.—Evidence.*—The power of a court to make *nunc pro tunc* entries in proper cases is inherent, and is not governed by section 396, R. S. 1881, and may be made upon memoranda by the clerk in his issue docket, and upon a special finding of facts by the court in the cause, with his conclusions of law thereon. *Chissom v. Barbour, 1*
 2. *Same.—Time.*—Such *nunc pro tunc* entry of a judgment should be made as of the date when the judgment was actually pronounced. *It.*
 3. *Same.—Bill of Exceptions.—Semble,* that a motion for a *nunc pro tunc* entry is no part of the record unless made so by bill of exceptions or order of court. *Ib.*
 4. *Injunction.—Master Commissioner.*—Where, by agreement of parties in open court, there is a reference to a master to report the amount due from the defendants to the plaintiff upon a judgment in controversy, and the master reports the amount due, and judgment is rendered therefor, which judgment is paid by the defendants, the original judgment is thereby superseded, and its collection may be enjoined. *Johnson v. Kitch, 30*
 5. *Res Adjudicata.*—A judgment is only conclusive upon matters within the issues, and not on after-occurring facts not involved in the suit in which the judgment was rendered. *Mitchell v. French, 334*
 6. *Same.—Evidence.*—It will be presumed that the questions involved in the issues in a former action were tried therein, and oral evidence of such fact is harmless. *Ib.*

7. *Conclusiveness.—Collateral Attack.*—Where a court of general jurisdiction has cognizance of a matter in controversy, and of the parties, its decree is binding on all other courts, until it is reversed or set aside by some appropriate proceeding for that purpose. It can not be attacked collaterally. It is conclusive as to all matters therein embraced, including the findings as to parties before the court. There can be no judicial inspection behind a judgment or decree save by appellate power. *Anderson v. Wilson, 403*
8. *Parties.*—One who is not made a party to an action is not concluded by the judgment therein rendered. *Petry v. Ambroscher, 510*

JUDICIAL KNOWLEDGE.

See INTOXICATING LIQUOR, 2.

JURISDICTION.

See HIGHWAY, 1; PLEADING, 16; STATUTES, 2.

Bankruptcy.—Effect on Pending Proceedings.—The fact, that a complainant or cross complainant is declared a bankrupt while proceedings are pending on his complaint or cross complaint, does not defeat the jurisdiction of the court. *Anderson v. Wilson, 408*

JUROR.

See CRIMINAL LAW, 13 to 15.

JURY.

See CRIMINAL LAW, 7, 9, 10, 13 to 15; INTERROGATORIES TO JURY; INSTRUCTIONS TO JURY; PRINCIPAL AND AGENT, 6; RAILROAD, 15, 19.

LEASE.

See GUARANTY; PLEADING, 2 to 4.

LEGISLATURE.

See NUISANCE; STATUTES, 3.

LICENSE.

See INTOXICATING LIQUOR, 1; NEGLIGENCE, 16; RAILROAD, 21; WATER-COURSE.

LIEN.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; MECHANIC'S LIEN; MORTGAGE, 2, 3, 5, 6; PLEADING, 17; PRINCIPAL AND SURETY, 1 to 3; VENDOR AND PURCHASER.

LIFE-ESTATE.

See WILLS, 1, 2.

LIFE INSURANCE.

1. *Application.—Pleading.—Complaint.—Exhibit.*—The application for a policy of life insurance need not be filed with the complaint in an action on the policy. *Penn Mutual L. Ins. Co. v. Wiler, 92*
2. *Same.—Disease.—Answer.—Demurrer.*—Where an answer to a complaint on a policy of life insurance avers that the insured answered "No" to the question in the application, "Has any near relative been afflicted with or died of consumption," etc., whereas he had had near relatives who were afflicted with and had died of such disease, but does not name them or state the degree of relationship, it is insufficient on demurrer, as stating a conclusion of law. *Ib.*
3. *Same.—Contract of Insurance, How Construed.—Interrogatory to Applicant.—Ambiguity.*—A contract of life insurance should be liberally construed, with a view to effectuate its purpose, and, if there be any ambiguity in an interrogatory propounded to the applicant, or if it be capable of more than one answer, it should be construed most.

strongly against the insurer, and most favorably to the insured, in whose favor all doubt should be resolved. *Ib.*

4. *Same.—Partial Answer.—Warranty.—General Provisions of Application.*—If the answer given by the applicant to an interrogatory be in itself true, and there is no intentional suppression or omission or fraud on his part, though the question be such as to suggest a fuller and more detailed answer, yet, if the insurer be content with the partial answer, he can not claim a warranty extending beyond such partial answer; nor can general provisions following the questions and answers in the application make this otherwise. *Ib.*
5. *Same.—Evidence.—Physician.—Privileged Communication.—Waiver.—Beneficiary.*—Under section 497, R. S. 1881, relating to privileged communications, a physician can not, in an action by the beneficiary on the policy, when objection is made by the plaintiff, testify as to his professional attendance on the insured before the date of his application for insurance; this privilege, however, creates no absolute incompetency, and it may be claimed or waived by the beneficiary, but the production in evidence, by such beneficiary, of facts learned in a professional capacity by one physician, is not a waiver of the right to object to the divulging of other confidential communications by other physicians. *Ib.*
6. *Same.—Declarations of Insured.—Res Gestæ.—Hearsay.—Breach of Warranty.*—The declarations of the insured, made some time previous to his application for insurance, and not shown to have been parts of the *res gestæ* of any acts or facts indicating a diseased condition of the insured, which the declarations tend to explain, can not prove or tend to prove the fact of his ill health, but constitute mere hearsay, and, as such, are not admissible against the beneficiary, to show a breach of warranty. *Ib.*
7. *Same.—Burden of Proof.*—Where the defendant, in such case, pleads in answer that the insured made an untrue answer to a certain question contained in the application, the burden is on him to establish such fact. *Ib.*
8. *Procuring Settlement of Claim by Fraudulent Representations.—Agent.—Executor.*—Where a life insurance company, by its authorized agent, falsely and fraudulently represents to the assured's executor, whose mental faculties are at the time impaired by age, financial disasters and domestic affliction, that sufficient evidence has been discovered to avoid the policy, and that such company will contest and defeat its collection, and thereby procures a settlement of the claim and the surrender of the policy, by paying an amount grossly unjust to the estate of the assured, such settlement may be set aside and the balance due on the policy recovered. *McLean v. Equitable L. Assurance Society, 127*
9. *Same.—Payment before Due.—Consideration.*—The fact that the insurance company paid such money to the executor a few days before he could have legally demanded and enforced its payment, is immaterial, where it does not appear that such payment constituted any part of the consideration for the settlement. *Ib.*
10. *Same.—Pleading.—Complaint.—Exhibit.*—A paragraph of complaint, founded on a policy of insurance, which fails to make the policy or a copy thereof a part of the pleading, or to show a sufficient excuse for not doing so, is bad. *Ib.*
11. *Same.—Demurrer to Evidence.—Application of Evidence.—Harmless Error.*—But where there is a demurrer to evidence which fully sustains another paragraph, which is sufficient, it is the duty of the court to apply the evidence to such paragraph and render judgment thereon;

and, in such case, overruling a demurrer to the bad paragraph is a harmless error. *Ib.*

LIQUIDATED DAMAGES.

See CONTRACT, 4.

LIQUOR LAW.

See INTOXICATING LIQUOR.

LIS PENDENS.

See JURISDICTION; PLEADING, 15.

MALICIOUS PROSECUTION.

1. *Instruction.—Malice.—Probable Cause.*—In an action for malicious prosecution, an instruction informing the jury that malice may be inferred from the want of probable cause, but that the want of probable cause can not be inferred from malice, is right. *McCasland v. Kimberlin*, 121
2. *Same.—Evidence.—Witness.—Impeachment, Credibility After.*—In such case, if the defendant testifies as a witness, and impeaching testimony, regarding his reputation for truth and veracity, has been offered against him, it is not erroneous for the court to instruct the jury that they are to determine his credibility under all the facts and circumstances as proved, and that if he "gave a fair, candid and honest statement" of the whole transaction in controversy, they should not disregard his testimony. *Ib.*
3. *Good Character of Plaintiff.*—Evidence of the good character of the plaintiff, in actions for malicious prosecution, is competent. *Pennsylvania Co. v. Weddle*, 138
4. *Same.—Evidence.—Probable Cause.*—Evidence of information received before preferring the charge, by the person who institutes a prosecution for a criminal offence, and tending to establish the guilt of the person prosecuted, is competent as to the question of probable cause, but evidence of information received after the charge has been preferred is not. *Ib.*
5. *Same.—Province of Court and Jury.—Instructions.—Hypothetical Statement.*—In an action for malicious prosecution, if the facts are not disputed, the court must decide as matter of law, whether they constitute probable cause; but where the facts are disputed the court must hypothetically state the material facts which there is evidence fairly tending to prove, and positively direct as to the law thereon, leaving to the jury to determine the existence or non-existence of the facts. *Ib.*

MANSLAUGHTER.

See CRIMINAL LAW, 3.

MARRIED WOMAN.

1. *Mortgage of Land Acquired by Gift.—Estoppel.—Deed.*—While the act of 1879 (Acts 1879, Spec. Sess., p. 160) was in force, a mortgage by a married woman, to secure her husband's debt, of lands acquired by gift, was invalid, and a recital in the deed to her, showing a cash consideration, did not estop her from showing by parol evidence that the conveyance was in fact a gift, and not for a valuable consideration. *Levering v. Shockey*, 558
2. *Same.—Statute Construed.*—The present statute, R. S. 1881, section 5117, which subjects a married woman to *estoppel in pais*, is not retroactive. *Ib.*
3. *Alienation of Land Acquired by Previous Marriage.—Partition.—Husband and Wife.*—Although a married woman can not, during the existence of a second or subsequent marriage, alienate real estate acquired and held by her in virtue of a previous marriage, yet, if the real estate so

acquired and held by her is an undivided share or interest in the lands of her previous husband, she is entitled to have such share or interest set off to her in severalty, and, to that end, she may bring and maintain an action of partition against the owner or owners of the residue of such lands. *Klinesmith v. Socwell, 539*

4. *Same.—Lands not Susceptible of Division.—Order of Sale.—Distribution of Proceeds.—Estoppel.*—Where, in such suit, it is ascertained or found by the court that the lands of the previous husband are not susceptible of division between the parties, without damage to their respective interests therein, the court may lawfully order and decree the sale and conveyance of such lands during the existence of such second or subsequent marriage, so as to vest in the purchaser and grantee the fee simple estate in the share or interest therein which descended to such married woman as the widow of her previous deceased husband; and upon such sale and conveyance, the proceeds of the share or interest of such married woman in the lands of her previous husband must be paid to her unconditionally, and thereafter she will be estopped from asserting, as such widow, any further title, claim or interest in or to such lands. *Ib.*

MASTER AND SERVANT.

See NEGLIGENCE, 2 to 13, 18 to 23.

MASTER COMMISSIONER.

See JUDGMENT, 4.

Practice.—Bill of Exceptions.—Where exceptions to the report of a master commissioner require, on appeal, an examination of the evidence, it must be set forth in a bill of exceptions, signed by the master.

Clark v. VanCourt, 113

MEASURE OF DAMAGES.

See BAILMENT, 2; NEGLIGENCE, 9; PRINCIPAL AND AGENT, 5, 6; RAILROAD, 13.

MECHANIC'S LIEN.

1. *Material Man.—Public Building.—County.—Contractor's Bond.—Remedy by Action on.*—Under sections 5293 and 5295, R. S. 1881, relating to the enforcement of mechanics' liens, there could be no lien upon a county building on account of materials furnished therefor to the contractor, and likewise no personal liability on the part of the county in favor of such material man. In such case, the remedy is by action on the contractor's bond as provided for by sections 4246 and 4247, R. S. 1881. *Scrist v. Board, etc., 59*

2. *Furnishing Materials to Contractor.—Repair of Building.*—Under sections 647 and 648, 2 R. S. 1876, p. 266 (see, also, sections 5293 and 5294, R. S. 1881), no lien can be obtained on a building for materials furnished therefor to a contractor, to be used in repairing the same, under a contract to which the owner is not a party. Nor does the fact that the owner knew that the materials used in repairing the building were being purchased by the contractor from the party who asserts the lien, tend, in such case, to establish any claim against the premises. *Woodward v. McLaren, 686*

MISTAKE.

See PLEADING, 3; REVIEW OF JUDGMENT.

MONEY HAD AND RECEIVED.

See ATTORNEY AND CLIENT, 4; PRINCIPAL AND AGENT, 4.

MORTGAGE.

See CHATTEL MORTGAGE; MARRIED WOMAN, 1.

1. *Foreclosure and Sale.—Rights of Senior Mortgagee.—Subrogation.*—A senior mortgagee, or one who has acquired his rights by subrogation, can claim no right to money realized by foreclosure of a junior mortgage and sale thereon, remaining after satisfaction of the decree. His remedy is to foreclose the senior mortgage. Such surplus money goes to the mortgagee by section 1104, R. S. 1881.
Firestone v. State, ex rel., 226
2. *Release.—Notice.*—Where a mortgagee, without payment, releases his mortgage upon the record thereof merely to enable the mortgagor to mortgage the same lands to A. for a loan, with the agreement that, as between the parties, it shall remain in force, if B. takes a subsequent mortgage with notice of the facts, the first mortgage will bind as to him and be a lien prior to his mortgage.
Farmers' Bank of Mooresville v. Butterfield, 229
3. *Subrogation.—Priority.*—A purchaser of land which is subject to a mortgage, who pays off an older mortgage, is entitled by subrogation to set it up and foreclose it as a lien prior to the later mortgage. *Ib.*
4. *Consideration.*—An extension of time, granted in consideration of the execution of a mortgage, constitutes the mortgagee a purchaser for value. *Ib.*
5. *Notice.—Agency.*—A purchaser of land for value, who, nearly five years prior to his purchase and while acting as agent for another in a different transaction, learns of the existence of a mortgage lien upon the land, is not chargeable as a purchaser with such notice. *Ib.*
6. *Same.—Release of Record.—Presumption.*—A release of record presumptively destroys the lien of a mortgage, and notice of the existence of the debt secured thereby does not charge any person with notice of the continued existence of the mortgage. *Ib.*
7. *Subrogation.—Presumption.*—A purchaser of land paying off a mortgage thereon can not be subrogated to the rights of the mortgagee without the payment of the purchase-money. Such payment will not be presumed, but must be proved by him. *Anderson v. Wilson, 408*
8. *Assumption by Grantee of Mortgage Debt.—Acceptance by Mortgagee.—Rescission of Contract of Sale.—Foreclosure.—Personal Judgment.*—Where A., the grantee of B., agrees to pay B.'s mortgage debt to C. as part of the purchase-money of land, A. does not thereby become the debtor of C., but there must be some act of adoption by C. to entitle him to the benefit of A.'s contract; and if, before such adoption, A. and B. rescind their contract, there is nothing left for C. except his original claim against B., and in a suit to foreclose his mortgage he is not entitled to a personal judgment against A.
Berkshire L. Ins. Co. v. Hutchings, 496
9. *Same.—Notice of Acceptance.—Practice.*—The question as to whether C. gave notice of his acceptance of A.'s assumption and agreement to pay the mortgage debt is one of fact, and the finding of the trial court will not be disturbed on the weight of the evidence. *Ib.*
10. *Parties.—Necessary and Proper Parties.—Foreclosure.—Owner of Equity of Redemption.*—Where land conveyed by mortgage is afterwards sold by the mortgagor, his vendee is a necessary party to the action to foreclose the mortgage, but the mortgagor is not, unless a personal judgment is sought against him, although he may be a proper party.
Petry v. Ambroacher, 510

MUNICIPAL CORPORATION.

See CITY; NUISANCE.

MURDER.

See CRIMINAL LAW, 3, 18, 19.

NEGLIGENCE.

See CITY, 2, 18 to 20; PRINCIPAL AND AGENT, 2; RAILROAD, 6, 7.

1. *Sufficiency of Complaint.—Demurrer.—Motion.*—In an action to recover damages for personal injuries caused, as alleged, by the negligence of the defendant, a general charge of such negligence is sufficient to withstand a demurrer to the complaint, for the want of facts; and, in general, objections to the sufficiency of a complaint, on the ground that its allegations in regard to negligence are not full, clear or explicit, can not be reached by a demurrer for the want of facts, but only by a motion to make the complaint, or the particular allegation, more certain and specific. *Cleveland, etc., R. W. Co. v. Wymant, 160*
2. *Master and Servant.—Fellow Servant.—Liability of Master.—General Rule.*—As a general rule, the common master is not liable to a servant for an injury caused by the negligence of a fellow servant engaged in the same line of employment. *Indiana Car Co. v. Parker, 181*
3. *Same.—Who are Fellow Servants.*—Servants serving a common master in the same line of employment are fellow servants, although some may be superior to others. *Ib.*
4. *Same.—Alter Ego.—When Master is Liable.*—Where a non-resident corporation entrusts to a superior resident officer, or agent, the duty of superintending the machinery of its factory and of managing its business, it is responsible to a servant who suffers an injury from unsafe or defective machinery upon which the servant is employed, under the control and direction of such officer or agent. *Ib.*
5. *Same.—Agent Representing Master.—Delegation of Master's Duties.*—Where the master delegates to an agent the performance of duties which the law devolves upon him, the agent stands as the representative of the master, and a servant may maintain an action for injuries caused by the negligence of the agent in matters in which he performs the duties of the master and is his representative. *Ib.*
6. *Same.—Duty of Master to Provide Safe and Suitable Machinery.*—It is the duty of the master to use ordinary care and diligence to provide safe and suitable machinery for use by the servants whom he employs to work upon it. *Ib.*
7. *Same.—Duty to Keep Machinery in Safe Condition.*—The master's duty does not end with providing safe and suitable machinery, but he is also bound to exercise a reasonable supervision over it, and to exercise ordinary care in keeping it in safe condition for use by his servants, and this duty he can not rid himself of by casting it upon an agent. *Ib.*
8. *Same.—Degree of Care Required of Master.*—It is only ordinary care that is required of the master, but ordinary care requires that he should take notice of the liability of a rope to become worn and unsafe from age and use. *Ib.*
9. *Same.—Measure of Damages.*—In computing damages, it is proper to take into consideration the pain and suffering endured by the injured servant, the expenses incurred for medical attention, the permanent effect of the injury, and its effect upon the ability of the injured person to earn money, or to pursue his trade or profession. *Ib.*
10. *Same.—Excessive Damages.—Verdict.*—The appellate court will not interfere with the verdict of the jury in such a case as this on the ground that the damages are excessive, unless they are such as to induce the belief that the jury acted from partiality, prejudice or corruption. *Ib.*
11. *Same.—Contributory Negligence.*—Where the evidence upon the question of contributory negligence is conflicting, or the inferences to be drawn

- from it are doubtful or not clear, the court will not decide, as a matter of law, whether there was or was not contributory negligence, but will, under proper instructions, leave the question to the jury as one of fact. *Ib.*
12. *Same.—Obeying Directions of Vice-Principal.*—A servant can not, as matter of law, be deemed guilty of contributory negligence because he changes from one part of the machinery to another in the shop where he is employed, in obedience to the directions of the agent set over him by the master. *Ib.*
 13. *Evidence.—Exhibition of Injured Hand to Jury.*—It was not a material error to permit the plaintiff in the course of his testimony to exhibit his injured hand to the jury. *Ib.*
 14. *Railroad.—Proximate Cause.—Intervening Agency.—Sufficiency of Complaint.*—In an action to recover damages for the death of the plaintiff's testator, caused, as alleged, by the defendants' negligence, there is no error in sustaining a demurrer to the complaint, where it appears, upon its face, that such negligence was not the proximate cause of such death, but that it resulted directly from the act of an intervening agency, over which the railway company defendant had no control.
Kistner v. City of Indianapolis, 210
 15. *Actionable when.*—An action for negligence will only lie where the defendant was under some duty to the plaintiff which he has omitted to perform.
Evansville, etc., R. R. Co. v. Griffin, 221
 16. *Same.*—Where one merely permits others, for their own accommodation, to pass over his lands, he is under no legal duty to keep them free from pitfalls or obstructions which may result in injury. *Aliter*, if he invite or induce such passage. *Ib.*
 17. *Same.—Pleading.—Contributory Negligence.*—A complaint for negligence resulting in injury, in which it fairly appears that the plaintiff needlessly took the risk of probable danger, does not sufficiently negative contributory negligence by the averment that the injury occurred "without any negligence on the part of the plaintiff." *Ib.*
 18. *Master and Servant.—Inexperienced Servant.—Dangerous Employment.—Caution.*—It is the duty of a master not to expose an inexperienced servant to a dangerous service without giving him warning, or such instruction as will enable him to avoid injury, unless both the danger and the means of avoiding it are apparent.
Atlas Engine Works v. Randall, 293
 19. *Same.—Alter Ego.—Fellow Servants.*—If the master subjects the servant to the command of another, without information or caution with respect to such obligations as the master owes, the other stands in the master's place, notwithstanding the two servants are, as regards the common employment, fellow servants. *Aliter*, if he defines the duty and authority of each with respect to the other, or gives instructions covering the subject of their employment, so as to give no authority to the one over the other, or so as to point out the danger of the service and the means of avoiding it. *Ib.*
 20. *Same.—Equal Knowledge of Danger.*—Where both the master and the servant have equal knowledge of the danger of the service required and of the means of avoiding it, and the servant, while engaged in the performance of the work he is set to do, is injured by reason of his own inattention and negligence, the master is not liable. *Ib.*
 21. *Contributory Negligence.—Minor.*—Contributory negligence on the part of a minor will defeat his right to recover for an injury, as in the case of an adult. *Ib.*
 22. *Master and Servant.—Fellow Servant.—Employing or Retaining Incompetent Servant.—Notice.—Pleading.—Complaint.*—A master is not liable in

damages to a servant for injuries resulting from the negligence of a fellow servant engaged in the same general employment, unless he has been guilty of negligence in the employment of, or, after notice, continues in his employment, the negligent or incompetent employee through whose negligence the injury was caused, and such negligence on the part of the master must be averred in the complaint.

Bogard, Adm'r, v. Louisville, etc., R. W. Co., 491

23. *Same.—Who are Fellow Servants.*—One who is engaged in hauling rock by means of a team, and those who are engaged in blasting such rock, all employed by a common master, are fellow servants, and such facts being shown by a complaint to recover for an injury to the teamster, an averment that the injured servant "had no connection whatever with any of the employees of the defendant who were engaged in blasting rock," is a mere conclusion, and the facts will control. *Ib.*

NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 3 to 10, 12.

NEW TRIAL.

See CRIMINAL LAW, 9, 10, 13, 15; DRAINAGE, 11; PRACTICE, 2, 3, 16, 17.

1. *Misconduct of Attorney in Argument.—Instruction.*—A citizen of M. county was engaged to teach school in F. county, and subsequently brought suit to recover for services. On application of the plaintiff, the venue of the cause was changed from F. county to M. county, where, upon the trial of the cause, the plaintiff's attorney in the closing argument, over the objection of the defendant, urged the jury to "stand by your own citizen," and also, over objection and against the admonition of the court, told the jury that "the school trustees, pupils and citizens of F. county are trying to disgrace and oppress a citizen of M. county," and other language calculated to prejudice the jury against the defendant. There was a verdict for plaintiff. *Held*, that this was such misconduct as entitled the defendant to a new trial.

Held, also, that the court could not, in its instructions, cure the error.

School Town of Rochester v. Shaw, 268

2. *Practice.—Complaint.—Demurrer.*—An application for a new trial made after the close of the term is an independent proceeding, and must be by complaint, and the sufficiency of the complaint may be tested by demurrer. *Hines v. Driver, 315*
3. *Same.—Exhibits.—Newly Discovered Evidence.*—In a complaint for a new trial it is proper to set out the evidence given on the former trial, and the affidavits containing the newly discovered evidence in exhibits filed with the complaint, and such exhibits will be considered part of the complaint for that purpose, but not for the purpose of supplying averments that should be made in the body of the pleading. *Ib.*
4. *Same.—Second New Trial.*—A party can obtain a second new trial upon the ground of newly discovered evidence only in very rare cases and by making an unusually strong and satisfactory case. *Ib.*
5. *Same.—Complaint Must Show that Evidence was not Discovered during Term.*—It must be shown in a complaint for a new trial upon the ground of newly discovered evidence, that it was not discovered during the term. *Ib.*
6. *Same.—Diligence.—Facts Must be Plead.*—The facts constituting the diligence alleged to have been used to obtain evidence must be pleaded, and it is not sufficient to plead conclusions. *Ib.*
7. *Same.—Making Inquiries for Evidence.*—Where the diligence alleged consists in making inquiries for evidence, it is necessary to state time, place and circumstances of making the inquiries. *Ib.*

8. *Same.—Materiality of Newly Discovered Evidence.*—The complaint must show the materiality of the newly discovered evidence, and show, also, a strong probability that if a new trial should be granted it would change the result. *Ib.*
9. *Same.—Cumulative Evidence.*—New trials will not be granted to permit the introduction of merely cumulative evidence, and evidence of the same kind, addressed to the same point, is cumulative. *Ib.*
10. *Same.—Admissions.*—Where admissions of a party to the same point are given in evidence on the trial, other admissions of a similar character and to the same point are cumulative. *Ib.*
11. *Signature.—Misconduct of Counsel.*—The genuineness of a signature was in issue by an answer under oath, purporting to be signed by the party, but this was not put in evidence, nor was there any evidence that the name was written by the party. In argument his attorney was permitted, over objection, to hand the affidavit and paper in dispute to the jury, that they might judge of the handwriting by comparison, which they did.
Held, that this was error. *Shorb v. Kinzie, 429*
12. *Newly Discovered Evidence.—Diligence.*—An action for a new trial, on the ground of newly discovered evidence, can not be maintained unless diligence was employed to obtain the evidence upon the trial.
Test v. Larsh, 562
13. *Same.—Payment.—Burden of Proof.*—Where, upon the trial, the controversy turns upon the proof of payment, and the plaintiff, who has the burden and who knows the defendant will probably dispute it, calls but a single witness to prove it, without making any effort to obtain corroborating testimony, though one of his witnesses could have then testified to the newly-discovered evidence, the plaintiff fails to show the requisite diligence, and is not entitled to a new trial. *Ib.*

NON-RESIDENT.

See PRINCIPAL AND AGENT, 2.

NOTICE.

See CITY, 19, 20; CONTRACT, 2; DRAINAGE, 15 to 17; FRAUD, 1, 3; GUARANTY, 1; INSURANCE, 2; MORTGAGE, 2, 5, 6, 9; NEGLIGENCE, 20, 22; PARTNERSHIP, 2, 4; PRINCIPAL AND SURETY, 4; RAILROAD, 12, 14.

NUISANCE.

1. *Municipal Corporations.—Wooden Buildings.*—A wooden building is not in itself a nuisance, but it may become so when it endangers surrounding buildings, and a municipal corporation may enact an ordinance providing for the summary removal of such a building.
Baumgartner v. Hasty, 575
2. *Same.—Ordinance.—Fire Limits.*—A municipal corporation has power to prescribe fire limits, and to prevent the erection of wooden buildings within the prescribed limits. *Ib.*
3. *Same.—Public Nuisance.*—A public nuisance may be summarily abated without notice to the owner of the thing which constitutes the nuisance, provided no unnecessary damage is done to the property. *Ib.*
4. *Same.—Legislative Power.*—The Legislature has power to invest municipal corporations with authority to abate public nuisances without resorting to judicial proceedings. *Ib.*
5. *Same.—Forfeiture of Property.*—A municipal corporation has no power to forfeit the property of a citizen, but the abatement of a public nuisance by the tearing down of a wooden building which constitutes a nuisance is not a forfeiture of property. *Ib.*

NUNC PRO TUNC ENTRY.

See DRAINAGE, 15, 16; JUDGMENT, 1 to 3.

OFFICE AND OFFICER.

See TOWNSHIP TRUSTEE.

PARTIES.

See ASSIGNMENT OF ERROR, 2, 3; CONTRACT, 4; JUDGMENT, 8; MORTGAGE, 10; PLEADING, 1, 14, 17; PRACTICE, 11; PRINCIPAL AND AGENT, 7; REAL ESTATE, ACTION TO RECOVER, 1.

Joint Interest of Plaintiffs.—Where there are several plaintiffs, a joint interest in each and all of them must be shown, in order to a recovery.

Holman v. Hibben, 338

PARTITION.

See MARRIED WOMAN, 3, 4; PLEADING, 17; REVIEW OF JUDGMENT.

Motion to Set Aside Report of Commissioners.—*Presumption.*—*Practice.*—Where a motion is made to set aside the report of partition commissioners, on the ground that they set off to one person more than his share of land, but no showing is made of the truth of such ground, the presumption is that it is not true in fact, and the motion should be overruled.

Parks v. Kimes, 148

PARTNERSHIP.

1. *Chattel Mortgage.*—*Assignment for Benefit of Creditors.*—Where a surviving partner executed a mortgage of the partnership assets to secure a firm liability, a complaint to foreclose the mortgage is sufficient, as against an assignee appointed subsequent to the execution of the mortgage, without showing any compliance with the statute by such surviving partner.
Hadley v. Milligan, 49
2. *Notice of Dissolution.*—*Promissory Notes.*—After the dissolution of a partnership, if one partner executes a note in the individual names of both partners (not the firm name), for goods in the line of the partnership business, sold and delivered to him on the firm's credit by one who had dealt with the firm, and had no knowledge of the dissolution, no notice thereof having been given, the note will bind both.
Iddings v. Pierson, 418
3. *Power of Partner to Bind Firm.*—A note given within the scope of the business of a partnership, by one of its partners, in the names of all, binds all; but a note given by one partner over the dissent of his co-partners, manifested before or at the time of its execution, of which the payee, at the time of its delivery, had knowledge, will not bind the partners so dissenting without evidence of their subsequent ratification.
Ib.
4. *Liability of Retiring Partner.*—A retiring partner, to avoid liability for debts of the new firm, must cause notice of his retirement to be given; otherwise he will be liable for subsequent contracts of the former partnership with those who knew of its existence, and are ignorant of its dissolution, at the time of the making of the contracts, and who make them upon the faith and credit of all the partners.
Ib.
5. *Rule as to Partnership and Individual Creditors.*—*Decedent's Estates.*—In this State, partnership creditors, even though there are no partnership assets, and no solvent partner, can not participate with individual creditors in the individual estate of a deceased partner.
Warren v. Farmer, 598
6. *Same.*—*Purchase of Partnership Property by One Partner who Agrees to Pay Firm Debts as part Consideration.*—Where one partner buys out the entire interest of his co-partners, the firm assets become his individual property; and a promise to pay the debts of the firm, as part consid-

eration of the purchase, is binding on him, and the partnership creditors have a right to treat him as individually liable for their claims, by virtue of such promise, in common with original individual creditors. *Id.*

7. *Same.*—Where the partner so purchasing dies, partnership creditors may file their claims against, and participate on equal terms with individual creditors in, his estate. *ZOLLARS, C. J., dissents. Id.*

PAYMENT.

See **CONTRACT**, 6; **DECEDENTS' ESTATES**, 4; **LIFE INSURANCE**, 8, 9; **NEW TRIAL**, 13; **PROMISSORY NOTE**, 2 to 4; **RAILROAD**, 3, 21; **SALE**; **TAXES**, 3, 5.

PERSONAL PROPERTY.

See **ASSIGNMENT FOR BENEFIT OF CREDITORS**; **CONTRACT**, 5, 6; **DECEDENTS' ESTATES**, 3; **FRAUD**; **SALE**.

PHYSICIAN.

See **LIFE INSURANCE**, 5.

PLEADING.

See **CITY**, 7; **CONTRACT**, 2, 4; **COSTS**, 2; **DEMURRER TO EVIDENCE**, 3; **DRAINAGE**, 1, 2, 18, 19; **FAMILY SETTLEMENT**, 1, 2; **GUARANTY**; **HIGHWAY**, 2; **INSURANCE**, 1; **LIFE INSURANCE**, 1, 2, 4, 7, 10; **NEGLIGENCE**, 1, 14, 17, 22, 23; **NEW TRIAL**, 2, 3, 5, 6, 8, 11, 12; **PARTIES**; **PRACTICE**, 1 to 3, 10 to 12; **PRINCIPAL AND SURETY**, 4; **PROMISSORY NOTE**, 2, 3; **REAL ESTATE, ACTION TO RECOVER**; **SUPREME COURT**, 4; **TAXES**, 5; **WATERCOURSE**.

1. *Promissory Note.—Party in Interest.—Plea in Bar.*—In an action on a promissory note by the endorsee, a verified answer by the makers, admitting the execution of the note, but alleging that the payee was still the owner thereof, and that the plaintiff had no interest in it other than as the agent and trustee of the payee, who was the real party in interest, and that the note was assigned to the plaintiff only for the purpose of collection, is a plea, not in abatement, but in bar.

Pixley v. Van Nostern, 34

2. *Complaint.—Answer.—Written Instrument.*—Where an answer sets up a different lease from that declared on in the complaint in the cause, it can not be considered in determining the sufficiency of the complaint on demurrer.

Hylar v. Humble, 38

3. *Same.—Mistake.—Reformation.*—An answer, stating a lease differing in terms from that declared on in the complaint and contradictory thereof, but not averring a mutual mistake and asking reformation, is bad on demurrer. *Id.*

4. *Same.—Lease.—Subsequent Parol Agreement.—Consideration.*—In an action for possession of real estate under a written lease, an answer which sets out a subsequent parol agreement to execute notes with security for the payment of the rent, but does not show any consideration for the subsequent agreement, so as to make it supersede the written agreement and bar the plaintiff's right of possession until the notes were executed, is bad on demurrer. *Id.*

5. *Bad Answer Sufficient for Bad Complaint.*—Where a demurrer is overruled to a bad answer, the plaintiff can not avail himself of the error if his complaint is insufficient.

Boven v. Striker, 45

6. *Argumentativeness.*—Argumentativeness is not a cause of demurrer under the code.

Ford v. Griffin, 35

7. *Premature Bringing of Action.—Complaint.—Demurrer.*—Where a complaint does not show upon its face, or by proper exhibits attached, that

- the action has been prematurely brought, it is not bad on demurrer for that reason. *Trentman v. Fletcher, 105*
8. *Argumentative Denial.—Demurrer.*—A pleading which contains an argumentative denial of material allegations in the pleading to which it responds, is good on demurrer. *Clouser v. Jones, 123*
 9. *Contract.—Damages.—Remoteness.*—In a suit to recover for the value of a table-rake to be attached to a reaper, a counter-claim, alleging that by the contract of sale the plaintiff agreed to adjust the same to the defendant's reaper so that he could properly harvest a crop of his wheat, known by the plaintiff to be then growing, that the plaintiff could not and did not do so, whereby the defendant, being unable to procure another machine, was compelled to use it to avoid greater loss, whereby he lost 80 bushels of his wheat, of the value, etc., is bad on demurrer, the damages being too remote. *Fuller v. Curtis, 237*
 10. *Complaint.—School Teacher.—Employment by School Town.—Contract.*—A complaint against the school town of R., alleging the employment of the plaintiff by the defendant to teach school and a breach of the contract, is sufficient without alleging employment by the trustees of such school town, or that the town was incorporated, or that there was a board of trustees in said town. *School Town of Rochester v. Shaw, 268*
 11. *Same.—Account.*—In such case, a paragraph of complaint founded on an account is not bad on demurrer for that reason. *Id.*
 12. *Demurrer.*—A demurrer can be sustained only for defects apparent on the face of the pleading to which it is filed. *Thames L. & T. Co. v. Beville, 309*
 13. *Cross Complaint.—Process.*—As to co-defendants who are parties to a cross complaint, its filing is the commencement of a new action, and, for that purpose, it is a new pleading to enforce a separate and distinct right. *Anderson v. Wilson, 402*
 14. *Same.—Requisites of Cross Complaint.*—While, in this State, it is not necessary, under the code, to pray process in accordance with the former chancery practice, but process issues as a matter of course on the filing of a complaint, yet the parties against whom relief is demanded must be clearly designated by name in the complaint as defendants. But as to matters of mere description and identification, many of the allegations of the original complaint may be referred to in the cross complaint, even if the original action has been dismissed. *Id.*
 15. *Answer in Abatement.—Pendency of Prior Action.—Demurrer.—Error.*—It is error to sustain a demurrer to a verified answer in abatement setting up that a prior action, between the same parties and for the same cause of action, is pending and undetermined on appeal in the Supreme Court. *Merrill v. Richey, 416*
 16. *Exhibits.—Judgment.*—The transcript of a judgment need not be filed with the complaint, and if filed is no part of the record, and will not be considered upon demurrer to the complaint, even if it shows that the court which rendered the judgment had no jurisdiction. *Conwell v. Conwell, 437*
 17. *Former Adjudication.—Sufficiency of Answer.—Partition.—Demurrer.*—Where a defendant, in an action for the partition of land, files a cross complaint setting up certain equitable liens on the land for improvements made, taxes paid and interest thereon, an answer, stating in substance that the matters alleged in such cross complaint were or might have been litigated in a former suit for the partition of the same land, between substantially the same parties, claiming respectively the same

shares by the same title as in the pending action, is good on demurrer as an answer of former adjudication, in bar of such action.

Elwood v. Beymer, 504

PRACTICE.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CHANGE OF VENUE; DEMURRER TO EVIDENCE; DRAINAGE, 4 to 8, 10, 11; GUARANTY, 2; HIGHWAY, 1, 3; INTERROGATORIES TO JURY; INSTRUCTION TO JURY; MASTER COMMISSIONER; MORTGAGE, 9; NEGLIGENCE, 1, 10, 11; NEW TRIAL; PARTITION; PLEADING, 2, 5, 6, 8, 12, 13, 15, 16; RAILROAD, 14, 15, 18, 19; SUPREME COURT; SURVEY; VERDICT.

1. *Motion to Strike Out.*—Overruling a motion to strike out parts of a pleading, even if erroneous, is not an available error.

McLean v. Equitable Life Assurance Society, 127

2. *Allegations and Evidence.*—*Material Variance.*—*New Trial.*—*Error.*—The plaintiff must recover upon and according to the allegations of his complaint, or not at all; and where he obtains a verdict upon evidence which makes or tends to make a case materially different from the case stated in his complaint, it is error to overrule the defendant's motion for a new trial. *Cleveland, etc., R. W. Co. v. Wynant, 160*

3. *Striking out Pleadings.*—*New Trial.*—That a pleading or part thereof has been erroneously struck out, is not cause for a new trial; such ruling can only be presented to the Supreme Court by an assignment of error founded thereon. *City of New Albany v. White, 206*

4. *Equity.*—*Trial by Jury.*—*Answers to Interrogatories.*—Where a cause in equity is submitted to a jury, the finding is only for the information of the court, and a motion for judgment upon answers to interrogatories, notwithstanding a general verdict, is improper.

Farmers' Bank v. Butterfield, 229

5. *Same.*—There is no error in submitting to a jury questions of fact in a cause in equity, where the record shows that the court did this only for information, and afterwards made a finding for itself. *Id.*

6. *Same.*—*Instructions.*—In such case, instructions to the jury should not be general as in a suit at law, but should be only such as relate to the determination of the questions of facts submitted. *Id.*

7. *Discretion.*—*Admission of Evidence after Argument has Begun.*—The court may, in its discretion, admit further evidence after argument has begun. *Curme, Dunn & Co. v. Rauh, 247*

8. *Same.*—*Evidence.*—*Lost Writing.*—Upon sufficient proof of the loss of a writing, its contents may be proven by parol. *Id.*

9. *Same.*—*Impeachment of Witness.*—*Contradictory Statements.*—Section 508, R.S. 1881, authorizes the impeachment of a witness by proof of his contradictory statements, when he has answered that he does not recollect having made them. *Id.*

10. *Open and Close of Argument.*—Where, under the pleadings, the plaintiff is entitled to recover his whole demand without proof unless the defendant establishes his answer demanding affirmative relief, the latter is entitled to open and close the evidence and the argument.

McCormick, etc., Co. v. Gray, 285

11. *Pleading.*—*Joint Demurrer.*—*Parties.*—A party against whom a cause of action is shown can not demur to the complaint because no cause of action is shown against some other defendant. And so, where there is a joint demurrer, and a cause of action is shown against any one of the parties demurring, the demurrer must be overruled.

Holzman v. Hibben, 333

12. *Pleading.*—*Complaint.*—*Amendment.*—*Interrogatories.*—When an amended complaint is filed, it supersedes not only the original complaint,

but interrogatories filed with it, and in that case it is not error to refuse to require more specific answers to such interrogatories.

Hill v. Nisbet, 341

13. *Signing Instructions.—Supreme Court.*—There is no error in refusing instructions which are not signed by the party or his counsel, nor will the Supreme Court consider a refusal in any case unless all the instructions given are in the record. *Johnson v. Gwinn, 466*
14. *Same.—Examination of Witness.*—Where a witness is asked as to a lost instrument, about which he has been testifying, "Is that all you remember of the contents of the instrument?" it is not error upon his request to read to him his testimony already given. *Ib.*
15. *Harmless Error.—Evidence.*—The refusal to permit a defendant to prove the truth of a necessary averment in the plaintiff's complaint is a harmless error. *Ib.*
16. *Evidence.—When Error in Admitting not Available.*—Error in admitting testimony is not available where no objection is made to its introduction, and no motion made to strike it out. *Howlett v. Scott, 485*
17. *Same.*—It is not error to reject evidence which, if admitted, would not have any effect on the finding. *Ib.*

PREFERRED CREDITOR.

See BANK CHECK, 2.

PRESUMPTION.

See CITY, 19, 20; CRIMINAL LAW, 19; DRAINAGE, 4; INTOXICATING LIQUOR, 3; JUDGMENT, 6; MORTGAGE, 6, 7; PARTITION; SUPREME COURT, 1.

PRINCIPAL AND AGENT.

See ATTORNEY AND CLIENT, 1; EVIDENCE, 5; NEGLIGENCE, 4, 5, 7, 12, 14, 19; RAILROAD, 1, 2.

1. *Loan Agent.—Evidence.—Recitals in Written Instrument.*—Recitals in reports of appraisers, chosen by an agent appointed to negotiate loans, to place a value on property upon which loans are asked, constitute no evidence of the truth of the facts stated, but may be considered in determining whether the agent acted in good faith. *Union Mut. L. Ins. Co. v. Buchanan, 63*
2. *Same.—Non-Resident Principal.—Agent's Liability.—Fraud.—Negligence.*—Where such an agent sends to his non-resident principal such information regarding the security offered as he has obtained, he is not liable for losses unless he is guilty of fraud or of negligence in not obtaining more. *Ib.*
3. *Same.—Evidence.—Reasons for Writing Letter.—Witness.*—A witness can not be permitted to state the reasons which influenced him to write a letter, not ambiguous in meaning, in which he gave explicit directions to his agent to do a designated act, as such agent may act upon the letter, and the reasons existing in the mind of the writer can not, unless known to the agent, affect his rights. *Ib.*
4. *Same.—Implied Contract.—Money Had and Received.*—In an action by an agent against his principal on an implied contract to account to him for money had and received, and to pay the reasonable value of the agent's services, the plaintiff may prove how much of his time was devoted to the business of such principal. *Ib.*
5. *Same.—Measure of Compensation.*—Where a rate of compensation for services is fixed by contract, that rate governs; but where there is no contract fixing the rate, the reasonable value of such services is the measure of compensation to be recovered. *Ib.*

6. *Same.—Custom.—Jury.*—Where there is a customary value fixed for services, that rate controls; but where there is no such customary rate, the jury must ascertain their value from the evidence placed before them. *Ib.*
7. *Parties.—When Agent May Sue in his Own Name.*—An agent, selling property for and by authority of his principal, on credit, and having accounted to and satisfied his principal therefor, may sue the purchaser in his own name. *Fuller v. Curtis, 237*

PRINCIPAL AND SURETY.

See PROMISSORY NOTE; RAILROAD, 11.

1. *Release by Extension of Time.—Judgment.*—Where there is a judgment against A. and B., which is a lien on real estate, and the creditor, having knowledge that A. is merely surety for B., by valid contract with B., extends the time of payment for a definite time without A.'s consent, the latter is released and may maintain a suit to relieve his land from the apparent lien of the judgment. *Gipson v. Ogden, 20*
2. *Same.—Consideration.—Chattel Mortgage.*—In such case, the execution by B. to the creditor of a mortgage on goods levied upon to satisfy the judgment, is a sufficient consideration to support the agreement to give time. *Ib.*
3. *Same.*—In such case, the remedy exists though the fact of suretyship was not established by the judgment, as might have been done by virtue of the statute, inasmuch as the statute did not deprive the surety of rights existing at the common law and in equity. *Ib.*
4. *Same.—Evidence.*—In such case, the general denial being pleaded, proof that the plaintiff was surety, and that the creditor had notice thereof, is essential. *Ib.*
5. *Same.*—In such case, a covenant in the chattel mortgage to extend the time of payment until a day named, and that the mortgagor should have possession of the goods until that day, is proof of the agreement to give time. *Ib.*

PRIVILEGED COMMUNICATION.

See LIFE INSURANCE, 5.

PROCESS.

See PLEADING, 13, 14.

PROMISSORY NOTE.

See CONTRACT, 2; PARTNERSHIP, 2, 3; PLEADING, 1, 4.

1. *Principal and Surety.—Oral Contemporaneous Agreement between Payee and Surety.—Consideration.*—Where it is orally agreed between the payee of a promissory note—made in the usual form, due in six months, and payable without any condition expressed—and one of the makers, who signed as surety, contemporaneously with the making of the note, that in consideration that such surety would secure a debt then owing by F., the other maker, to the payee, a wholesale merchant, the latter would extend to F. such "further credit for goods as would enable him to carry on his business," and would credit on the note all sums of money which F. should thereafter pay him until the note was fully paid, such agreement can not be pleaded or proved to discharge the surety from liability on such note, first, because it is too uncertain, and can not be enforced, and, second, because it is in contradiction of the terms of the note. *Trentman v. Fletcher, 105*
2. *Same.—Pleading.—Payment.—Demurrer.*—In such case, a paragraph of answer setting out the above facts, and further averring that after the note was executed, and prior to its maturity and before suit thereon, F., "under and by virtue of said contract and agreement," paid to the

payee, at different times, sums of money equal to the amount of said note, by which it was fully paid, is good on demurrer as a plea of payment. *Ib.*

3. *Same.—General Scope and Tenor of Pleading.—Failure of Consideration.*—Where the general scope and tenor of another paragraph of answer in such case is to set up, as a plea of failure of consideration, the agreement between the surety and the payee, and the refusal of the payee to perform it, such paragraph can not be held good as a plea of payment, even if the facts alleged would be otherwise sufficient for such purpose. *Ib.*
4. *Same.—Application of Payments.*—If money be paid by the principal maker to the payee from time to time, after the note has matured, with directions to apply it on the note, it is his duty so to apply it, and if he fails or refuses the law will make the application, irrespective of the agreement between the payee and surety. *Ib.*

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 15.

PUBLIC POLICY.

See MECHANIC'S LIEN; RAILROAD, 8.

RAILROAD.

See CITY, 2; NEGLIGENCE, 1, 15 to 17, 22, 23.

1. *Principal and Agent.—Liability for Acts of Agent.—Torts.*—Where a corporation employs an agent to detect and arrest offenders against its property, and such agent, acting within the general scope of his employment, arrests an innocent man, such corporation is liable therefor, although the particular act was not directly authorized.
Pennsylvania Co. v. Weddle, 138
2. *Same.—Evidence.—Declarations of Agent.*—In an action by the injured person for damages, he may give in evidence the declarations of the agent made at the time of the arrest. *Ib.*
3. *Public Aid.—Levy of Tax Exceeding Two per Cent. in Two Years.—Shrinkage in Value of Taxables.—Injunction.—Tender.*—A township voted an appropriation of \$30,000 in aid of a railroad, that sum being less than two per cent. of the taxables for the preceding year, 1879. In 1880, the county board levied a tax of one per cent. on such taxables, but, owing to shrinkage in the value thereof, this levy produced less than one-half of the appropriation. In 1881, the board levied the entire remainder of the appropriation, which required 144 per cent.
Held, that under sections 4056 and 4057, R. S. 1881, the board had no power to order a levy exceeding two per cent. in any one period of two years, and that the collection of the excess could be enjoined by paying or tendering the part of the tax legally due.
Held, also, that if a levy of two per cent. in two years would not have produced the required amount, by reason of the shrinkage, an additional levy for the deficiency might have been ordered in the succeeding year.
Miles v. Ray, 166
4. *Fences.*—If proper fences are built and maintained, it will make no difference, in an action by an adjoining land-owner for stock killed, whether such fences are built and maintained by the railroad company or such adjoining land-owner, or whether they are upon the right of way, or upon the lands of such owner, with his consent.
Bond v. Evansville, etc., R. R. Co., 301
5. *Same.—Agreement by Land-Owner to Fence.—Animals.*—Where an adjoining land-owner expressly or impliedly agrees to build and maintain fences between his lands and the railroad, as to him the track

- will be regarded as fenced, and he can not recover from the company for the loss of animals which, for the want of such fence, pass to the track and are injured or killed. *Ib.*
6. *Same.—Farm Crossings.—Gates.—Negligence.*—Where gates are allowed at farm crossings for the convenience of an adjoining land-owner, he is bound to keep them closed, and if he fails to do so, and his animals pass through them to the railroad and are injured or killed, he can not recover from the company on the ground that it has neglected to fence its track as required by the statute. *Ib.*
 7. *Same.—Cattle-Pits.*—In such case, and as to such land-owner, the company is not bound to maintain cattle-pits at such crossing. *Ib.*
 8. *Consolidation.—Public Policy.*—Under the statutes of this State, railroad corporations may acquire by purchase, or consolidate with, other connecting or intersecting lines; and the organization of a railroad corporation, with the view of ultimately consolidating, upon equitable terms and in accordance with the provisions of the statute, with one already existing, is not against public policy. *Hill v. Nisbet, 341*
 9. *Same.—Buying Stock in other Roads.—Ultra Vires.*—A railroad company, having power to consolidate with connecting or intersecting lines, may, under the statute, with a view to accomplishing such consolidation and carrying out the object for which it was created, purchase the stock of such other roads. *Ib.*
 10. *Same.—Equity.—Estoppel.*—Persons who constituted a majority of the directors when such purchase of stock was made, can not be heard in equity to question the validity of such purchase. *Ib.*
 11. *Same.—Transfer of Stock.—Sureties.—Indemnity.*—A railroad company, merely organized, but without means or credit, purchased stock of another company, giving its notes therefor with sureties, the stock purchased being held by one of the sureties for indemnity. It failed to pay its notes at maturity, and its stockholders prevented the making of assessments or calls upon themselves to provide a fund for such payment, the stock purchased then being of less value than was supposed when the purchase was made. Thereupon an arrangement was made by the concurrence of the purchasing company and its sureties, some of whom were its directors, whereby an association of men, including said sureties, took, in good faith, a transfer of the stock, paying therefor the notes which had been given for it.
Held, that the transfer of the stock was not void, and equity would not interfere to set it aside at the instance of stockholders who had paid nothing upon their stock subscriptions. *Ib.*
 12. *Same.—Forfeiture of Stock for Non-Payment of Calls.—Notice.*—The non-payment of calls upon subscriptions for capital stock, if notice of the calls and demand of payment be made, will, without other notice, warrant a forfeiture of the stock under section 3896, R. S. 1881. *Ib.*
 13. *Right of Way.—Measure of Damages.*—The damages for taking the right of way for a railroad upon condemnation are measured by the value of the land taken and any injury to the rest of the tract through which it extends. *Indiana, etc., R. W. Co. v. Allen, 409*
 14. *Same.—Condemnation.—Notice.—Practice.*—Filing exceptions to the inquest in proceedings to assess damages for right of way taken by a railroad company is a waiver of notice. *Ib.*
 15. *Same.—Construction of Statute.—Sheriff.—Jury.*—In such proceedings, under sections 887 and 925, R. S. 1881, the requirement that the sheriff shall charge the jury is merely directory, and its omission does not affect the proceedings. *Ib.*
 16. *Same.—Damages.—When and to Whom They Accrue.*—When a railroad

- takes possession and builds its road upon the lands of another with out appropriation or condemnation, as the statute provides, the damages then accrue to the owner, and a subsequent conveyance of the whole tract gives the grantee no right to any damages. *Ib.*
17. *Same.—Guardian and Ward.*—A guardian can not grant to a railroad company a right of way upon lands of his infant ward. *Ib.*
18. *Right of Way.—Award of Appraisers.—Exceptions.—Issue.—Evidence.—Damages.*—Where a railroad company appropriates land for its right of way, and the appraisers appointed to appraise the damages of the owner of the land, by reason of such appropriation, file their award of such damages, and the owner appeals from such award and excepts thereto upon the ground, among others, that the damages awarded were inadequate and unjust, for the reason that when the road was built, as proposed, upon the line appropriated, it would be necessary for the owner to fill his land, from two to five feet, the entire length of the line appropriated, at large cost to him, and where, upon the trial of the issue thus tendered, evidence is admitted tending to prove the cost of making such fill, as an element of the owner's damages, the railroad company can not successfully complain of the admission of such evidence as error for the first time in the Supreme Court.
Terre Haute, etc., R. R. Co. v. Crawford, 550
19. *Same.—Cost of Fill.—Evidence.—Instruction.—Error.*—Where, upon the trial of the issue so tendered, evidence is offered and admitted, without objection or exception, tending to prove the cost to the owner of making such fill, an instruction, to the effect that in determining the amount of the owner's damages arising from the appropriation of his land for such right of way, it is proper for the jury to consider, among other things, the cost to him of making such necessary fill, is within the issues and applicable to the evidence in the cause, and, therefore, is not an available error. *Ib.*
20. *Same.—Evidence.—Opinion of Non-Expert.*—The opinion of a non-expert witness, as to the cost or value of the work in making such fill, is competent evidence. *Ib.*
21. *Same.—Appropriation for Right of Way.—Appeal from Appraisers' Award.—Payment of Final Damages.—Vesting of Title.*—Where a railroad company appropriates land for its right of way, and the appraisers award damages to the owner of the land, from which award an appeal is taken to the proper court, the payment to the clerk of the damages awarded by the appraisers will operate only as a license to the railroad company to take possession of the land so appropriated; and the title to such land will not vest in such railroad company until it has fully paid the damages finally assessed and adjudged in favor of such owner upon the final determination of such appeal by the proper court. *Ib.*

RATIFICATION.

See CONTRACT, 1; PARTNERSHIP, 3.

REAL ESTATE, ACTION TO RECOVER.

1. *Assignment of Chose of Action.—Parties.*—The statute which requires the assignor of a chose in action, without endorsement, to be made a party to answer as to the transfer and his interest therein, does not apply to actions for the possession of real estate and damages for its detention.
Cartwright v. Yaw, 119
2. *Same.—Pleading.—Cross Complaint.—Demurrer.—Trespass.*—A cross complaint is not bad on demurrer for charging a trespass sounding in tort, where each party, the plaintiff in his complaint and the defendant in his cross complaint, charges the other with wrongful acts in taking

possession of the same real estate, and each sues for possession of the same real estate and damages for its detention. *Id.*

RECOUPMENT.

See COSTS, 2.

REFORMATION.

See PLEADING, 3.

RELEASE.

See MORTGAGE, 2, 6; PRINCIPAL AND SURETY, 1.

RENTS.

See DECEDENTS' ESTATES, 2; TENANTS IN COMMON; WILLS, 4.

RES ADJUDICATA.

See JUDGMENT, 5 to 7; PLEADING, 17.

RESCISSION.

See FAMILY SETTLEMENT; MORTGAGE, 8.

RES GESTÆ.

See LIFE INSURANCE, 6.

RESTRAINT OF TRADE.

See CONTRACT, 4.

REVERSION.

See WILLS, 2.

REVIEW OF JUDGMENT.

New Matter.—Mistake of Law.—Partition.—Where an attorney, acting as such, innocently advises his client, an administrator, erroneously as to his rights in a matter in which the attorney has an adverse interest, whereby the client and attorneys employed by him are misled, and take a judgment in partition for a share of real estate, to the advantage of the first attorney, the whole of which was owned by the intestate, the discovery of the truth afterwards is material new matter, not discoverable by reasonable diligence, justifying a review under section 617, R. S. 1881, as against the first attorney. *Dippel v. Schicketane*, 376

RIGHT OF WAY.

See RAILROAD, 13 to 21.

SALE.

See FRAUD; INJUNCTION, 2; MARRIED WOMAN, 4; TAXES.

Chattels.—Delivery.—Condition.—Upon the sale of goods for cash, a delivery in expectation of immediate payment is conditional, and until payment or waiver thereof no title passes. *Curme, Dunn & Co. v. Rauh*, 247

SCHOOLS.

See PLEADING, 10, 11.

SELF-DEFENCE.

See CRIMINAL LAW, 4.

SHERIFF.

See RAILROAD, 15.

Compensation for Keeping Jail and Caring for Prisoners.—A sheriff, in this State, for services rendered by him in keeping the county jail and taking care of the prisoners confined therein, is entitled to no compensation in addition to the amount allowed by law for the boarding of prisoners. *Bynum v. Board, etc.*, 90

SHERIFF'S SALE.

See MORTGAGE, 1.

SIGNATURE.

See NEW TRIAL, 11.

SPECIAL FINDING.

See VERDICT, 1.

SPECIAL JUDGE.

See JUDGE.

STARE DECISIS.

Bona Fide Purchaser.—Judicial decisions are evidences of the law, but where they are not long established, and are palpably erroneous and plainly productive of injustice, they should be overruled, and a party who buys lands during a pending litigation can not hold it as a *bona fide* purchaser solely on the ground that in former decisions the court had declared the law to be as claimed by his grantor. *Paul v. Davis, 422*

STATUS.

See DESCENTS, 3, 4; STATUTE, 3.

STATUTE.

1. *Validity and Effect.*—Curative statutes are valid, and may heal defects and irregularities in judicial proceedings; but, where the proceeding was had in a tribunal having no jurisdiction of the subject-matter, the proceeding is void, and can not be made valid by a curative statute. *Strosser v. City of Fort Wayne, 443*
2. *Same.—Common Council.—Board of Commissioners.—Jurisdiction.*—Where the statute confers exclusive jurisdiction upon the board of commissioners to order lands annexed to a city, the power can not be exercised by the common council, and a statute attempting to legalize an order made in such a case by the common council is inoperative and void. *Ib.*
3. *Construction of.*—A statute introducing a new right, or creating a new status, is not to be construed as a separate and independent law, but is to be considered as forming part of one uniform system, and, in giving it effect, it is proper for the courts to look to other statutes, to the common law, to the principles of natural justice, to the source from which the new right was derived, and to the object intended to be accomplished by the Legislature. *Humphries v. Davis, 274*

STATUTE CONSTRUED.

See CRIMINAL LAW, 1, 13; CITY, 2, 13, 14; DESCENTS, 1, 4; DRAINAGE, 1, 17; MARRIED WOMAN, 1, 2; MECHANIC'S LIEN; MORTGAGE, 1; RAILROAD, 3, 15; TAXES, 1, 3.

STATUTE OF FRAUDS.

See CONTRACT, 5, 6; GUARDIAN AND WARD.

STATUTE OF LIMITATIONS.

See ACTION.

STREET.

See CITY, 2 to 5, 7, 8, 13, 14, 18 to 20; INJUNCTION, 1.

SUBROGATION.

See MORTGAGE, 1 to 3, 7.

SUNDAY.

See INTOXICATING LIQUOR, 8.

SUPERIOR COURT.

See ASSIGNMENT OF ERROR, 1, 2.

SUPREME COURT.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 9 to 11, 18; MASTER COMMISSIONER; NEGLIGENCE, 10; PLEADING, 15; PRACTICE; RAILROAD, 18.

1. *Improper Argument of Counsel.—Bill of Exceptions.—Presumption.—Practice.*—Where alleged improper remarks of counsel to the jury are not preserved in the record by bill of exceptions showing that they were objected to, or what action the court took with respect to them, the Supreme Court will not consider them, but will presume, nothing appearing in the record to the contrary, that if the remarks were inappropriate, the trial court in some way set the matter right.
Foraythe v. Kreuter, 27
2. *Same.—Judgment.—Motion.*—Where there is no bill of exceptions in the record showing that objection was made to the order and judgment of the trial court, or any motion to modify or change it, no question in relation thereto is properly before the Supreme Court. *Ib.*
3. *Harmless Error.*—A judgment will not be reversed for a harmless error.
Union Mut. L. Ins. Co. v. Buchanan, 63
4. *Practice.—Motion to Strike Out.*—Where a part of a pleading has been stricken out on motion, the Supreme Court will not review the ruling unless the motion to strike out is in the record. *Ford v. Griffin, 85*
5. *Practice.—Bill of Exceptions.—Sufficiency of Evidence.—Instructions.*—Where the bill of exceptions in the record does not show that it contains all the evidence, the Supreme Court can not decide as to its sufficiency, nor consider the instructions asked or given, unless the instructions given are such as would be erroneous under any supposable state of the evidence.
Carterwright v. Yaw, 119
6. *Bill of Exceptions.—Apparent Omission of Evidence.*—Although the bill of exceptions concludes with the usual formula, "this was all the evidence given in the case," yet if, on the face of the bill, there is an apparent omission of evidence, the Supreme Court will not consider or decide any question which depends, for its proper decision, upon the evidence in the cause.
Collins v. Collins, 266
7. *Practice.—Judgment.*—The correctness of a judgment can not be questioned for the first time in the Supreme Court.
Thames L. and T. Co. v. Beville, 309
8. *Same.—Bill of Exceptions.—Omission of Evidence.*—Where it appears by the bill of exceptions that it does not contain all of the evidence rendered at the trial, that which is in the record can not be examined to determine its sufficiency to sustain the verdict. *Ib.*
9. *Same.—Affidavits as to Cause of Omission.*—The failure to include all the evidence in the bill of exceptions can not be remedied by filing affidavits in the Supreme Court asserting that the absent evidence was omitted by agreement of the parties to the action. *Ib.*
10. *Practice.—Weight of Evidence.*—Where there is some evidence tending to sustain the verdict, the judgment will not be disturbed by the Supreme Court on the weight of the evidence.
Baker v. Carr, 330
11. *Same.—Harmless Error in Rejecting Evidence.*—The rejection of a proper question will not warrant the reversal of a judgment, where it is apparent that the party was not injured thereby. *Ib.*
12. *Practice.—Weight of Evidence.*—Where evidence tends to sustain the

verdict, the Supreme Court will not disturb it on the weight of the evidence. *City of Aurora v. Bitner, 396*

13. *Same.—Excessive Damages.*—A verdict will not be disturbed on the ground of excessive damages, unless they appear, at first blush, to be grossly excessive. *Id.*
14. *Same.—Instructions.*—Where instructions given and refused have not been filed as the statute, section 533, R. S. 1881, requires, but are in the record by a bill of exceptions which fails to show any exception taken to the giving or refusal, no question thereon can be made in the Supreme Court. *Eslinger v. East, 434*
15. *Same.*—Where the evidence is not in the record, the Supreme Court will not review the finding of the trial court upon an issue of fact. *Kennell v. Smith, 494*

SURETY.

See PRINCIPAL AND SURETY; PROMISSORY NOTE; RAILROAD, 11.

SURVEY.

See EVIDENCE, 7.

Effect as Evidence.—A survey by the county surveyor, made as provided by statute, conclusively binds the parties thereto unless an appeal be taken. *Hunter v. Eichel, 463*

TAXES.

See GUARDIAN AND WARD; RAILROAD, 3.

1. *Sale.—Failure of Title.—Rate of Interest.—Statute Construed.*—Under the proviso to section 3 of the act of March 5, 1883 (Acts 1883, p. 95), amending section 6497, R. S. 1881, which latter section repealed section 257 of the act of December 21, 1872, a purchaser at tax sales in 1867 and 1871, upon the failure of his title in a trial had after such act of 1883 went into effect, is entitled to recover interest only at the rate of six per cent. per annum, as provided by the statute in force at the date of such sales. *Bowen v. Striker, 45*
2. *Same.—Deed.—Must be Witnessed by County Treasurer.*—There can be no recovery of land under a tax title, even on a sufficient complaint, if the tax deed be not witnessed by the county treasurer, as required by the statute authorizing the execution of such deed. *Id.*
3. *Special Assessments.—Omitted Property.—Taxes Paid.—Refunding Amount Paid.*—Under the assessment law of December 21st, 1872, and its amendments, special assessments of omitted property were only authorized for the current year, and where such assessments were made for previous years, they were liable to be vacated and set aside upon the application of the taxpayer. But if the taxpayer, without such application, pay the taxes on such omitted property so specially assessed, and thereafter files his claim with the county board to obtain the refunding of the taxes so paid by him, it is not enough for him to show that such special assessments were not authorized by law, but he must also show that the taxes so paid by him were "wrongfully assessed." *Board, etc., v. Murphy, 570*
4. *Same.—Wrongfully Assessed Taxes.—Meaning of.*—In such case it is not enough to show that the special assessment of the taxes paid was irregular and unauthorized by law, but it must also be shown that such taxes were wrongfully, that is unjustly, assessed and levied. *Id.*
5. *Same.—Sufficiency of Complaint.—Claim under Statute.—Pleading.*—In presenting a claim against the county in the commissioners' court, no formal pleading or complaint is necessary; but where the claimant seeks to obtain relief under a statute, he must state such facts in his claim or complaint as will show *prima facie* that he is entitled to such relief. *Id.*

TENANTS IN COMMON.

Rents.—Right of Tenant to Recover from Co-Tenant.—One tenant in common who occupies the land is not accountable for rent unless he excludes his co-tenant, but is accountable where he receives the rent from a third person. *Humphries v. Davis*, 69

TENDER.

See CITY, 14; INJUNCTION; RAILROAD, 3.

TORT.

See RAILROAD, 1, 2; REAL ESTATE, ACTION TO RECOVER, 2.

TOWN.

See CITY; *As to Town Plat*—See EVIDENCE, 7; NUISANCE.

TOWNSHIP.

See RAILROAD, 3.

TOWNSHIP TRUSTEE.

1. *Eligibility.*—A township trustee who has been in office two consecutive terms immediately preceding the election at which he offers himself as a candidate is ineligible. *State, ex rel., v. Johnson*, 489
2. *Same.—Election.—Votes for Ineligible Candidate.*—Votes cast for a person not eligible to election can not be counted against eligible candidates. *Ib.*
3. *Same.—Qualification.—Forfeiture of Office by Failure to Qualify.*—A person elected to the office of township trustee who fails to give bond as required by section 5527, R. S. 1881, for more than six months after the election, will be deemed to have abandoned the office unless some satisfactory excuse for the delay is shown. *Ib.*

TRESPASS.

See REAL ESTATE, ACTION TO RECOVER, 2.

By Stock Running at Large.—Fencing.—In the absence of an order by the board of county commissioners permitting cattle to run at large, the owner is liable for damages caused by any trespass they may commit while so running at large, without reference to the quality of fencing through which they may pass, or whether they are breachy or accustomed to doing mischief. *Stone v. Kopka*, 458

TRIAL.

See CRIMINAL LAW, 10; PRACTICE, 4, 5, 6.

ULTRA VIRES.

See CITY, 1; NUISANCE; RAILROAD, 9.

VARIANCE.

See PRACTICE, 2.

VENDOR'S LIEN.

See VENDOR AND PURCHASER, 2.

VENDOR AND PURCHASER.

See MORTGAGE; STARE DECISIS.

1. *Volunteer.—Consideration.*—One who has not paid a consideration for property is, as a general rule, regarded as a mere volunteer, and a mere volunteer can not secure the defeat of a lien or the overthrow of a judgment. *Petry v. Ambroscher*, 510
2. *Same.—Bona Fide Purchaser.—Husband and Wife.—Vendor's Lien.—Precedent Debt.*—A wife who receives a conveyance of land from her husband in payment of a precedent debt, and does not change her

condition on account of the conveyance, is not a *bona fide* purchaser for a valuable consideration in such a sense as to be entitled to defeat the vendor's lien of her husband's grantor for the purchase-money of the land. *Id.*

VENIRE DE NOVO.

See VERDICT.

VERDICT.

See CRIMINAL LAW, 9; INTERROGATORIES TO JURY; NEGLIGENCE, 10; PRACTICE, 2, 4, 5.

1. *Special Findings.*—*Venire de Novo.*—*Practice.*—Contradictory answers by the jury to interrogatories, the general verdict being in due form, will not justify judgment notwithstanding the general verdict, nor the award of a *venire de novo*. *Hereth v. Hereth, 55*
2. *Venire de Novo.*—*Practice.*—Defects in the form of a verdict are available only upon motion for a *venire de novo*. *Thayer v. Burger, 262*
3. *Uncertainty.*—*Venire de Novo.*—A verdict which reads, "We, the jury, find for the plaintiff and assess her damages at \$175, with six per cent. interest," is not so uncertain or defective as to authorize a *venire de novo*. *Thames L. & T. Co. v. Beville, 309*

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

VOLUNTEER.

See VENDOR AND PURCHASER, 1.

WAIVER.

See ASSIGNMENT OF ERROR, 4; DEMURRER TO EVIDENCE, 2, 3; HIGHWAY, 3; LIFE INSURANCE, 5; RAILROAD, 14; SALE.

WAREHOUSEMAN.

See BAILMENT.

WARRANTY.

See CONTRACT, 2; LIFE INSURANCE, 4, 6.

WATERCOURSE.

1. *Obstruction of.*—*License.*—*Consideration.*—*Argumentative Denial.*—*Demurrer.*—Complaint, alleging that plaintiff and defendant were owners of adjoining lands through which flowed a natural watercourse; that plaintiff, with the knowledge of defendant, expended \$1,000 in tile drains leading into such watercourse on plaintiff's land; that defendant unlawfully filled up and obstructed said watercourse, whereby plaintiff's land was irreparably damaged, etc. Answer, that the obstruction complained of was not of a natural watercourse, but of an artificial outlet to ponds of water, made by plaintiff with license of defendant, which license was granted without consideration, and was afterwards revoked, and the outlet filled up, and that defendant did not obstruct the natural outlet of said ponds.
Held, that the complaint was sufficient on demurrer.
Held, also, that the answer averred facts constituting an argumentative denial, and was good on demurrer. *Clauser v. Jones, 123*
2. *Same.*—*Estoppel.*—In such case, if any act was done, or money expended, on the faith of such license, the effect of which would be to prevent the revocation thereof, it should be pleaded. *Id.*

WIDOW.

See DECEDENTS' ESTATES, 4; FAMILY SETTLEMENT, 2, 3; MARRIED WOMAN, 4; WILLS, 1, 2.

WILLS.

1. *Life-Estate.—Widow.*—Where a clause in a will provided, "I also direct that the following described land" (describing it) "to be and belong to my said wife so long as she may live," the widow took a life-estate therein, notwithstanding a declaration in the first clause which indicated a purpose on the part of the testator to dispose of his entire estate, but which did not operate as such disposition, and notwithstanding, also, a statement in the last clause that the share of his real and personal estate given his wife should be in lieu of dower. *Parks v. Kimes, 148*
2. *Same.—Partial Intestacy.—Reversion.—Stock of Descent.*—In such case, there being no disposition made of the estate in reversion, the same descended to the children of the testator, and if one of them died before the termination of the life-estate, his reversionary interest, if he still owned it, descended to his heirs. *Id.*
3. *Construction of.—Charge of Support and Education of Children.*—A devise of land to the children of the testator's deceased son in fee simple, with the addition of these words, "It is my desire and intention that the mother of said children shall use and occupy said land until the youngest of said children shall become twenty-one years of age, to support and educate said children," gives the mother an estate in the land until the youngest child reaches full age, charged, however, with the support and education of the children, and such devise is not upon condition of her personal occupancy of the land. *Sibert v. Cox, 392*
4. *Same.—Guardian.*—In such case, where it appears that the children of the testator's deceased son have resided with their mother, and it is not shown that she has been unable or failed to educate or support her children, a guardian of such children can not call upon her for any portion of the rents and profits of said land; and if the guardian has collected the rents of said land, he must account to the mother for them. *Id.*

WITNESS.

See DRAINAGE, 9; EVIDENCE, 1 to 4; INSTRUCTIONS TO JURY, 7; MALICIOUS PROSECUTION, 2; NEGLIGENCE, 13; NEW TRIAL, 13; PRACTICE, 9, 14; RAILROAD, 20.

WOODEN BUILDING.

See NUISANCE.

WORDS AND PHRASES.

See CITY, 3; CRIMINAL LAW, 12; HIGHWAY, 2; INTOXICATING LIQUOR, 2; TAXES, 4.

WRITTEN INSTRUMENT.

See GUARANTY, 1; PLEADING, 2 to 4; PRACTICE, 8; PRINCIPAL AND AGENT, 1.

END OF VOL. 100.

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